Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by SBC Communications Inc.,	)	
Pacific Bell Telephone Company, and	)	WC Docket No. 02 - 306
Southwestern Bell Communications Services	)	
Inc., for Authorization To Provide In-Region,	)	
InterLATA Services in California	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 19,2002 **Released: December 19,2002**

By the Commission: Chairman Powell and Commissioner Copps issuing separate statements; Commissioner Martin dissenting and issuing a statement; and Commissioner Adelstein not participating.

TABLE OF CONTENTS

I. INTRODUCTION

1. On September 20, 2002, SBC Communications Inc., and its subsidiaries, Pacific Bell Telephone Company, and Southwestern Bell Communications Services, Inc. (collectively, Pacific Bell) filed this application pursuant to section 271 of the Communications Act of 1934, as amended,[1] for authority to provide in-region, interLATA service originating in the State of California.[2] We grant Pacific Bell's application in this Order based on our conclusion that Pacific Bell has taken the statutorily required steps to open its local exchange markets in California to competition.

2. We wish to acknowledge the effort and dedication of the California Public Utilities Commission (California Commission), for the significant time and effort expended in overseeing Pacific Bell's implementation of the requirements of section 271. The California Commission reviewed Pacific Bell's section 271 compliance in open proceedings with ample

[1] We refer to the Communications Act of 1934, as amended by the Telecommunications Act of 1996 and other statures, as rhe Communications Act or the Act. *See* 47 U.S.C. §§ 151 *et seq.* We refer to the Telecommunications Act of 1996 as the 1996 Act. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[2] *See Application by SBC Communications Inc., Pacific Bell Telephone Company, and Sourhwestern Bell Communications Services Inc., for Provision of In-Region, InterLATA Services in California,* WC Docket No. 02-306 (tiled Sept. 20, 2002) (Pacific Bell Application).

opportunities for participation by interested third parties. The California Commission adopted comprehensive performance measures and standards, as well as a Performance Incentives/Remedy Plan designed to create a financial incentive for post-entry compliance with section 271.[3] In addition, the California Commission provided for extensive third-party testing of Pacific Bell's operations support systems (OSS) offerings.[4] As the Commission has recognized, state proceedings demonstrating a commitment to advancing the pro-competitive purpose of the Act serve a vitally important role in the section 271 process.[5] We commend the state for its enormous time and effort in developing this application.

3. We also commend Pacific Bell for the significant progress it has made in opening its local exchange market to competition in California. Pacific Bell states that in its local service territory in California, competitive local exchange carriers (competitive LECs) provide local service to 786,000 residential lines, or 6 percent of total residential lines, and 1,816,000 business lines. or 20% of total business lines.[6] Additionally, of the estimated 2,602,000 competitive LEC lines in Pacific Bell's area in California, there were 151,000 resold lines, 222,000 UNE-Platform (UNE-P) lines, 494,000 lines using unbundled local loops, and an estimated 1,735,000 lines over CLECs' own self-provided facilities.[7] We believe that these results reflect the extensive efforts that Pacific Bell has made to open its local exchange markets to competition.

II. BACKGROUND

4. In the 1996 amendments to the Communications Act, Congress required that the Bell Operating Companies (BOCs) demonstrate compliance with certain market-opening requirements contained in section 271 of the Act before providing in-region, interLATA long

---

3 Pacific Bell Application, App. A, Vol 1, Tab 1, Affidavit of Enrico R. Batongbacal (Pacific Bell Batongbacal Aff.) at para. 102.

4 Pacific Bell Application at 2

5 *See, e.g., Applicarion of Verizon New York Inc., Verizon Enrerprise Solurions, Verizon Global Networks Inc., and Verizon Select Services, Inc., for Authorization to Provide In-Region. InterLATA Services in Connecticut,* CC Docket No. 01-100, FCC 01-208, Memorandum Opinion and Order, 16 FCC Rcd 14147, 14149, para. 3 (2001) (*Verizon Connecticut Order); Applicarion of Verizon New England Inc., Bell Atlantic Communications. Inc. (d/b/a Verizon Long Distance). NYNEX Long Distance Company (d/b/a Verizon Enierprise Solutions) and Verizon Global Networks Inc. for Authorization to Provide In-Region. InterLATA Services in Massachusetts, CC* Docket No 01-9, FCC 01-130, Memorandum Opinion and Order, 16 FCC Rcd 8988, 8990, para. 2 (2001) (*Verizon Massachusetts Order).*

6 Pacific Bell Application, App. A, Vol 5, Tab B, Affidavit of J. Gary Smith (Pacific Bell J. G. Smith Aff.) Table 2. at 7.

7 Pacific Bell J. G. Smith AN., Table 3, at 8. These figures represent the more conservative of two methods used by Pacific Bell to estimate competing carriers' self-provided lines (i.e., using E911 listings).

distance service.' Congress provided for Commission review of BOC applications to provide such service in consultation with the affected state and the U.S. Attorney General.'

5. On March 31, 1998, Pacific Bell filed its draft section 271 application, to provide in-region, interLATA service in California, with the California Commission." Following a series of collaborative meetings, comment cycles, and workshops, the California Commission released a report in October 1998 that provided Pacific Bell with a series of corrective actions that would bring them into further compliance with the requirements under section 271. On July 15, 1999, Pacific Bell made a compliance filing for section 271 approval with the California Commission."

6. Pacific underwent third party OSS testing from June 1999, until the first quarter of 2001.[12] In April 2001, the California Commission held an open hearing for all interested parties to discuss outstanding issues relating to Pacific Bell's application." A decision was released on September 19,2002, affirming a July 23,2002 Draft Order,[14] in which the California Commission granted Pacific Bell's motion for a finding that it had "substantially satisfied" the requirements set forth in section 271 of the 1996 Act.[15]

7. The California Commission determined that Pacific Bell had successfully complied with 12 of the 14 checklist items." The California Commission also emphasized that Pacific Bell had successfully passed the independent third party test of its OSS and noted the strong performance results Pacific Bell has achieved across many service categories.[17] The

---

8 The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)

9 The Commission has summarized the relevant statutory framework in prior orders. *See, e.g., Joint Application by SBC Communicarions Inc., Sourhwesrern Bell Tel. Co.. and Sourhwesrern Bell Communications Services, Inc., d/b/a Sourhwesrern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma.* CC Docket No. 00-217, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6241-42, paras. 7-10 (2001) *(SWBT Kansas/Oklahoma Order), aff'd in parr, remanded in parr sub nom. Sprint Communicarions Co. v. FCC,* 274 F.3d 549 (D.C. Cir. 2001) *(Sprint v. FCC).*

10 Pacific Bell Application at 5

11 Pacific Bell Batongbacal Aff. at para. 68

12 Pacific Bell Application at 5.

13 Pacific Bell Application at 7.

14 Pacific Bell Application at 7

15 *Decision Granting Pacific Bell Telephone Company's Renewed Motion for an Order That It Has Substantially Satisfied the Requirements of rhe 14-Point Checklist in § 27,1 and Denying That It Has Satisfied 5 709.2 of The Public Utilities Code* (Sept. 19, 2002), *(California Commission Order)* at 4-5. Pacific Bell Application at 5.

16 *Calfornia Cornmission Order* at *2*

17 *California Commission Order* at 2

California Commission, however, withheld approval of checklist item 11 (number portability) and checklist item 14 (resale).[18] According to the California Commission, Pacific Bell could not demonstrate its compliance with the number portability requirements of checklist item 11 until Pacific Bell implemented a mechanized Number Portability Administration Center (NPAC) check process.'' With regard to the resale requirements of checklist item 14, the California Commission concluded that Pacific Bell "has erected unreasonable barriers to entry in California's digital subscriber line market by both not complying with its resale obligation with respect to its advanced services...and by offering restrictive conditions in the SBC Advanced Solutions Inc. (ASI) CLEC Agreements."" Furthermore, based on its analysis of section 709.2 of the California Public Utilities Code, the California Commission determined that, although Pacific Bell met most of the technical requirements under section 271, it could not support Pacific's entry into the long distance market as beneficial to the public interest."

8. We note that subsequently, the California Commission issued a proposed draft decision on December 12,2002. in order to address the section 709.2 inquiry.[22] The drafi decision proposed several measures in order to alleviate concerns regarding the possibility of anti-competitive harm from Pacific Bell. With these proposed measures, the draft decision recommends that Pacific Bell be granted authority to operate and provide intrastate interexchange telecommunications services, provided that this Commission approve Pacific Bell's 271 application.

9. On October 25,2002, the Department of Justice filed its evaluation recommending approval of this application with certain qualifications. Specifically, the Department of Justice noted that the California Commission's decision regarding checklist items 11 and 14 do not appear to preclude approval of Pacific Bell's application." The Department also expressed concern regarding total-element long-run incremental cost (TELRIC) pricing and the true-up mechanism that Pacific Bell has proposed for use in California. Specifically, the Department of Justice states:

> Conceivably, SBC's proposal could have the effect of altering the Commission's approach to cross-state comparisons of rates. At the

---

18 *Calfornia Commission Order* at *2-3.*

19 *California Commission Order* at 3

20 *Calfornia Commission Order* at 3.

21 *California Commission Order* at **4.** California w establishes separate state public interest requirement with regard to Pacific Bell's entry into the intrastate interLATA market in California.

22 ***See*** Pacific Bell Dec. I3 *Ex* Parte Letter **at** Attach 2 (Draft Final Decision **on** the Public Utilities Code Section 709.2(c) Inquiry, R.93-04-003, *et seq.* (Dec. 12, 2002) (*Draft Final Decision on the Public UtilitiesCode Section 709.2(c) Inquiry*)).

13 Department of Justice Evaluation at 4

> very least, the ambiguity of the proposal invites unnecessary future debate over such issues. The Department therefore urges the Commission to resolve this ambiguity before relying in any way on SBC's commitment.[24]

10. In addition, in view of the California Commission's findings with respect to the public interest, the Department deferred to this Commission's decisions regarding the impact of continuing state proceedings on Pacific Bell's compliance with the section 271 public interest standard.[25] While the Department of Justice supports approval of Pacific Bell's application, based on the current record, it noted its conclusions were subject to the Commission's review of certain concerns expressed in its Evaluation.

III. COMPLIANCE WITH SECTION 271(c)(1)(A)

11. In order for the Commission to approve a BOC's application to provide in-region, interLATA services, a BOC must first demonstrate that it satisfies the requirements of either section 271(c)(1)(A) (Track A) or 271(c)(1)(B) (Track B).[26] To meet the requirements of Track **A,** a BOC must have interconnection agreements with one or more competing providers of "telephone exchange service . . . to residential and business subscribers."[27] The Act states that "such telephone service may be offered . . . either exclusively over [the competitor's] own telephone exchange service facilities or predominantly over [the competitor's] own telephone exchange facilities in combination with the resale of the telecommunications services of another carrier."[28] The Commission has further held that a BOC must show that at least one "competing provider" constitutes "an actual commercial alternative to the BOC,"[29] which a BOC can do by demonstrating that the provider serves "more than a ***de minimis*** number" of subscribers.[30]

---

24 Depanment of Justice Evaluation **at** 9.

25 Department **of** Justice Evaluation at ***5***.

26 47 U.S.C. § 271(d)(3)(A).

27 ***Id.***

28 ***Id.***

29 ***Application by SBC Communications Inc., Pursuanr to Section 271 of the Communicafions Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma,*** Memorandum **Opinion** and Order, 12 FCC Rcd 8685, 8695 al para. 14 (1997) (SWBT Oklahoma Order).

30 SWBT Kansas/Oklahoma Order, 16 FCC Rcd at 6357, para. 42; ***see also Application of Ameritech Michigan Pursuanr to Secfion 271 ofthe Communications Acr of 1934, as amended.*** *To* Provide ***In-Region, InterLATA Services in Michigan,*** Memorandum Opinion and Order, 12 FCC Rcd 20543, 20585, at para. 78 (1997) (Ameritech Michigan Order).

12. We conclude, as did the California Commission,' that Pacific Bell satisfies the requirements of Track A in California. We base this decision on the interconnection agreements Pacific Bell has implemented with competing carriers in California and the number of carriers that provide local telephone exchange service, either exclusively or predominantly over their own facilities, to residential and business customers." No party challenges Pacific Bell's finding of compliance with section 271(c)(1)(A). In support of its Track A showing, Pacific Bell relies on interconnection agreements with AT&T, WorldCom and Allegiance Telcom.[33] We find that each of these carriers serves more than a ***de minimis*** number of residential and business customers predominantly over its own facilities and represents an "actual commercial alternative" to Pacific Bell in California." Specifically, the record demonstrates that AT&T and WorldCom each provide service to residential and business customers over their own facilities, UNE-P and UNE Loops, and Allegiance Telcom provides service to residential and business customers over its own facilities and UNE Loops."

IV. PRIMARY ISSUES IN DISPUTE

13. As in recent section 271 orders, we will not repeat here the analytical framework and particular legal showing required to establish checklist compliance with every checklist item. Rather, we rely on the legal and analytical precedent established in prior 271 orders, and we attach comprehensive appendices containing performance data and the statutory framework for evaluating section 271 applications." Our conclusions in this Order are based on performance

---

31 ***Calrjornia Commission Order*** at 10.

32 *Calrjornia* ***Commission Order*** at 9. **For a** list **of competitive** LECs' **approved interconnection agreements, see Pacific Bell Batongbacal** Aff., **Attach. A-l Io A-9.**

33 **Pacific Bell J.G. Smith** Aff. **at para.** 5

34 ***See SWBT Oklahoma Order,*** **I2 FCC** Rcd at **8695, para. 14.**

35 **Pacific Bell** J.C. **Smith** Aff. at **Tab. 8, Attach,** E-I **and E-2 (*citing confidential information)***

36 **Appendices** B **(California Performance Data), and C (Statutory Requirements). See** *also,* ***Application by Verizon New England Inc., Bell Atlantic Communications. Inc.*** (*d/b/a* ***Verizon*** *Long* **Distance),** *NYNEX Long* ***Disiance Company*** (*d/b/a Verizon* ***Enterprise Solutions*****), *Verizon Global* Networks *Inc.*, and *Verizon* Select Services *Inc., for Authorization*** to ***Provide In-Region. InterLATA Services in Rhode Island,*** **Memorandum Opinion and Order, 17 FCC** Rcd 3300, **Apps. B, C, and D *(2002) (Verizon Rhode Island Order); Joint Application*** *by* ***SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell*** *Long* ***Distance Pursuant to Seclion 271 of the Telecommunications Act*** *of 1996 Io* ***Provide In-Rqion, InterLATA Services in Arkansas and*** *Missouri,* Memorandum Opinion and Order, 16 FCC Rcd 20719. **Apps. B, C, and D *(SWBT Arkansas/Missouri Order); Application*** of ***Verizon Pennsylvania Inc., Verizon*** *Long* ***Disrance, Verizon Enterprise Solutions, Verizon*** *Global* ***Networks Inc.***, **and *Verizon Select Services Inc. for Aurhorizarion to Provide In-Region, InterLATA Services in Pennsylvania,* Memorandum Opinion and Order, 16 FCC** Rcd **I7419. 17508-545,** Apps. B and **C** (2001) **(*Verizon Pennsylvania Order).***

data as reported in monthly performance reports reflecting service in the most recent months before filing, specifically, May through September 2002.[37]

14. We focus in this Order on the issues in controversy in the record. Accordingly, we begin by addressing Pacific Bell's compliance with checklist item 2 (UNEs), checklist item 11 (number portability), and checklist item 14 (resale). Next, we address the following checklist items: checklist item 1 (interconnection), checklist item 4 (unbundled local loops), checklist item 5 (transport), and checklist item 13 (reciprocal compensation). The remaining checklist items, 3, 6-10, and 12, are discussed briefly. We then consider whether the requested authorization would be consistent with the public interest, and address the California Commission's analysis under section 709.2 of the California Public Utilities Code. We find, based on our review of the evidence in the record, that Pacific Bell satisfies all of the section 271 requirements.

A. Checklist Item 2 − Unbundled Network Elements

15. Checklist item 2 of section 271 states that a BOC must provide "nondiscriminatory access to network elements in accordance with sections 251(c)(3) and 252(d)(1)" of the Act.[38] Section 251(c)(3) requires incumbent LECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.""

1. Pricing of Unbundled Network Elements

16. Section 252(d)(1) provides that a state commission's determination of the just and reasonable rates for network elements must be nondiscriminatory, based on the cost of providing the network elements, and may include a reasonable profit." Pursuant to this statutory mandate,

---

[37] We examine data through September of 2002 because they describe performance that occurred before comments were due in this proceeding on October 9, 2002. ***See*** *Applicarion by SBC* ***Communicarions, Inc., Southwestern Bell*** *Tel.* Co., ***and Sourhwestern Bell*** *Communications* ***Services, Ind. d/b/a Sourhwesrern Bell Long*** *Distance pursuant to Seciion 271* ***ofrhe*** *Telecommunications* ***Aci of1996*** ***io Provide In-Region.*** *InterLATA* ***Services in*** *Texas*, CC Docket No. 00-65, Memorandum Opinion and Order. 15 FCC Rcd 18372 at para. 39 (2000) ***(SWBT Texas Order).***

[38] 47 U.S.C. § 271(B)(ii). Overturning a 1997 decision of the Eighth Circuit Court of Appeals, on May 13, 2002, the U.S. Supreme Court upheld sections 51.315(c)-(f) ofthe Commission's rules, which, subject to certain limitations, require incumbent LECs to provide combinations of UNEs "not ordinarily combined in the incumbent LEC's network" and to "combine unbundled network elements with the elements possessed by the requesting telecommunications carrier." *Verizon* ***Communications, Inc.*** *v FCC*, 122 S. Ct. 1646, 1665 (2002) (*Verizon v. FCC*). In a prior decision, the Supreme Court upheld the Commission's authority to adopt sections 51.315(a)-(b) of the Commission's tules, which establish the general obligation of an incumbent LEC to provide combinations of network elements and require an incumbent LEC not to separate requested elements that it currently combines, except upon request. *AT&T Corp. v. Iowa Utils.* ***Bd.,*** *525* **U.S.** 366, 385,393-95 (1999).

[39] 47 U.S.C. § 251(c)(3).

[40] 47 U.S.C. § 252(d)(1).

the Commission has determined that prices for UNEs must be based on TELRIC principles of providing those elements."

17. In applying the Commission's TELRIC pricing principles in this application, we do not conduct a ***de novo*** review of a state's pricing determinations.[42] We will, however, reject an application if "basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce."[43] We note that different states may reach different results that are each within the range of what a reasonable application of TELRIC principles would produce. Accordingly, an input rejected elsewhere might be reasonable under the specific circumstances here.

IS. Commenters in these proceedings assert numerous challenges to Pacific Bell's pricing that were never raised before the state commission. Just as it is impractical for us to conduct a ***de novo*** review of the state commission's pricing determinations, it is likewise generally impractical for us to make determinations about issues that were not specifically raised before the state commission in the first instance. During the course of its UNE pricing proceeding, the state commission is able to cross examine witnesses, compel discovery, and direct the submission of additional record evidence on particular issues. This Commission lacks the time to employ such tools during the course of the 90-day statutory review period for section 271 applications. Without the means to test and evaluate evidence during this short statutory review period, and without a state record to analyze with respect to issues not raised before the state commissions, we are often left to resolve factually complex issues based simply on the untested written assertions of various experts. We have confidence that the California Commission will continue to exercise its authority over setting rates to ensure that UNE prices comply with TELRIC as required by our rules and the Act.

19. We take this opportunity to set forth the analytical framework we employ to review section 271 applications in these situations. **As** the Commission's previous decisions make clear, a BOC may submit as pari of its *prima facie* case a valid pricing determination from a state commission. In such cases, we will conclude that the *BOC* meets the TELRIC pricing requirements of section 271[44] unless we find that the determination violates basic TELRIC

---

[41] ***See Implementation*** *of the Local Competition* ***Provisions in the Telecommunications*** *Act of 1996,* CC Docket No. 96-98, First Repon and Order, 11 FCC Rcd 15499, 15844-47, paras. 674-79 (1 996) ***(Local Competition Order);*** 47 C.F.R. §§ 51.501-51.515. The Supreme Coun has recently upheld the Commission's forward-looking pricing methodology in determining the costs of **UNEs.** ***Verizon*** v. *FCC,* 122 S. Ct. at 1679 (2002).

[42] ***Verizon*** *Pennsylvania* ***Order,*** 16 FCC Rcd at 17453, para. *55* (citations omitted); ***see*** *also* ***Sprint Communications Company*** *L.P. v. FCC,* 274 F.3d 549, 556 (D.C. Cir. 2001) ("When the Commission adjudicates § **271** applications, it does not – and cannot – conduct ***de novo*** review of state rate-setting determinations. Instead, it makes **a** general assessment of compliance with TELRIC principles.").

[43] ***Verizon*** *Pennsylvania* ***Order,*** 16 FCC Rcd at 17453, para. 55

[44] When a state commission makes a determination that rates are TELRIC-compliant, it may **not** have explicitly analyzed every component of such rates, particularly when no party has taken issue with the component. Indeed, we (continued....)

principles or contains clear errors of fact on matters so substantial that the end result falls outside the range that a reasonable application of TELRIC principles would produce.[45] Once the BOC makes a *prima facie* case of compliance, the objecting party must proffer evidence that persuasively rebuts the BOC's *prima facie* showing. The burden then shifts to the BOC to demonstrate the validity of its evidence or the state commission's approval of the disputed rate or charge.[46] When a party raises a challenge related to a pricing issue for the first time in the Commission's section 271 proceedings without showing why it was not possible to raise it before the state commission, we may exercise our discretion to give this challenge little weight. In such cases, we will not find that the objecting party persuasively rebuts the *prima facie* showing of TELRIC compliance if the BOC provides a reasonable explanation concerning the issue raised by the objecting party.

20. With these principles in mind and after thoroughly reviewing the record in this application. we find that Pacific Bell's UNE rates in California are just, reasonable, and nondiscriminatory, and satisfy checklist item two. Before we discuss commenters' arguments and our conclusions, we summarize the pricing proceedings in California.

a. Background

21. The California Commission set UNE rates for Pacific Bell after an extensive multi-phase review process. On April 7, 1993, the California Commission initiated the Open Access and Network Architecture Development (OANAD) proceeding to facilitate the introduction of competition into the local telecommunications market in California.[47] The culmination of the OANAD cost proceeding was the issuance of two decisions in 1998 in which the California Commission approved with modifications TELRIC studies prepared by Pacific

(Continued from previous page)
do not provide extensive analysis on checklist items that receive little or no attention from commenters when our own review of the record leads us to conclude that the BOC has satisfied these requirements.

45 *See, e.g., Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in New Jersey,* WC Docket No. 02-67, Memorandum Opinion and Order, 17 FCC Rcd 12275, 12305, para. 68 (2002) *(Verizon New Jersey Order).*

46 *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana,* Memorandum Opinion and Order, 13 FCC Rcd 20599, 20635-39, paras. 51-59 (1998) *(Second BellSouth Louisiana Order).*

47 Pacific Bell Application App. D, Vol. 1, Tab 1, *Rulemaking on the Commission's Own Motion To Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Network; Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks (OANAD Proceeding),* R. 93-04-003, I. 93-04-002, Order Instituting Rulemaking and Order Instituting Investigation, California Commission (1993) *(OANAD Rulemaking and Investigation Order); see also* Pacific Bell Application App. A. Tab 23, Affidavit of Linda S. Vandeloop (Pacific Bell Vandeloop Aff.) at para. 9.

Bell, as well as the methodology and principles for future cost studies.[48] The California Commission specifically found that "[w]ith the corrections and adjustments ordered by this decision, the [recurring] cost studies submitted by Pacific [Bell]. . . adequately comply with the TELRIC principles adopted herein, and can be used to set prices for the unbundled network elements to be offered by Pacific [Bell]."[49] The California Commission also found that "[i]t is just and reasonable to use Pacific [Bell's] nonrecurring UNE cost model changeover model as modified, to develop final nonrecurring UNE and changeover costs for Pacific [Bell.]"[50]

22. Based on the TELRIC studies approved in these rate cases and after an exhaustive review process which included voluminous discovery, evidentiary hearings, and comments filed by interested parties, the California Commission adopted prices for the UNEs on November 18, 1999." In its decision, the California Commission acknowledged that the TELRIC costs that it had used to set rates were "based largely on data that [had] . . . not been updated since 1994" and that there was "evidence that some of these costs may be changing rapidly."" The California Commission therefore established a process for an annual reexamination of the costs of up to two UNEs.[53]

23. On June 14, 2001, as part of its first annual reexamination of the costs of Pacific Bell's UNEs, the California Commission determined that there was a reasonable presumption to

---

[48] Pacific Bell Application App. C, Vol. 3, Tab 30. *OANAD Proceeding,* Interim Decision Adopting Cost Methodology, Evaluating the Hatfield Computer Model, and Deciding Other Issues Related to Cost Studies of Pacific Bell's System, D.98-02-106, California Commission (1998) *(Firsr OANAD Cos! Decision);* Pacific Bell Application App. C, Vol. 5, Tab 45, *OANAD Proceeding,* Opinion, D. 98-12-079, California Commission (1998) *(Second OANAD Cost Decision);* see *also* Pacific Bell Vandeloop Aff. at para. 10.

[49] *Firsr OANAD Cost Decision,* Conclusion of Law No. 57; *see also* Pacific Bell Vandeloop Aff. at para. 10. The California Commission also found that Version 2.2.2 of the Hatfield Model, sponsored jointly by AT&T and MCI, had too many structural infirmities to allow it, and the hypothetical costs for the local exchange network it modeled, to be used in place of the TELRIC studies submitted by Pacific Bell.

[50] *Second OANAD Cost Decision,* Conclusion of Law No. 5; *see also* Pacific Bell Vandeloop Aff. at para. 10; Pacific Bell Application App. C, Vol. 6, Tab *50, OANAD Proceeding,* Order Granting Limited Rehearing to Modify Decision (D.) 98-12-079 and Denying Rehearing of Modified Decision, D. 99-06-060, California Commission, ordering para. no. 2(i) (1999) *(Second OANAD Cos! Decision Modification).*

[51] Pacific Bell Application App. C, Vol. 7, Tab 60, *OANAD Proceeding,* Interim Decision Setting Final Prices for Network Elements Offered by Pacific Bell, D. 99-11-050, California Commission (1999) *(OANAD Pricing Decision).* Numerous parties participated in the proceeding, including Pacific Bell, AT&T, MCI Communications Corporation (now WorldCom Inc.), Sprint, and NEXTLMK (now XO California, Inc.). See *also* Pacific Bell Vandeloop Aff. at paras. 10-11

[52] *OANAD Pricing Decision* at 168

[53] *Id.* at 168-69, Conclusion of Law Nos. 68, 69, and ordering para. 11. A party nominating a UNE for review must include a summary of evidence demonstrating a cost change of at least 20 percent up or down from the costs approved in the prior applicable rate case for the UNE to be eligible for nomination. *Id.* at 168-69; *see also* Pacific Bell Vandeloop Aff. at paras. 2-3.

believe that costs may have declined for unbundled switching and unbundled loops and began a proceeding to review the costs of these two UNEs.[54] On May 16, 2002, after finding that the inadequacies in Pacific Bell's cost filings had resulted in delays and the need to examine competing cost models, the California Commission adopted interim discounts to Pacific Bell's unbundled loops and unbundled local and tandem switching.[55] Specifically, the California Commission adopted on an interim basis a 15.1 percent, a 69.4 percent and a 79.3 percent reduction to Pacific's unbundled loop, unbundled local switching, and unbundled tandem switching rates, respectively.[56] On September 19, 2002, the California Commission extended the interim 69.4 percent discount beyond the basic (two-wire) port type to include all port types." The ***2002 Relook Proceeding*** has commenced and been consolidated with the ***2001 Relook Proceeding*** to consider the costs and prices of DS3 loops and entrance facilities, DS1 and DS3

---

[54] ***See Culfornia Commission Order*** at 109. The Assigned Commissioner and Administrative Law Judge in the 2001 reexamination proceeding reiterated an earlier decision denying a request for leave to file a competing cost model to that which Pacific Bell would file. They maintained that it was appropriate to limit the scope of the proceeding to review of Pacific Bell's cost model as long as the cost models and studies allowed parties to: (1) reasonably understand how costs are derived for unbundled loops and switching, (2) generally replicate Pacific Bell's calculations, and (3) propose changes in inputs and assumptions in order to modify the costs produced by these models. ***See Culfornia Commission Order*** at 109-10.

[55] Pacific Bell Application App. C, Vol. 10, Tab 77, *Joint* ***Applicarion*** *of AT&T Communications of California,* ***Inc.*** *(U 5002 C)* ***and WorldCom,*** *Inc.* ***jor*** *the* ***Commission*** *to* ***Reexamine the Recurring*** *Costs* ***and Prices of*** *Unbundled Switching in* ***Its First*** *Annual* ***Review*** *of Unbundled* ***Network*** *Element* ***Costs*** *Pursuant to* ***Ordering Puragraph*** *11 of D. 99-11-050, et al. (2001* ***Relook Proceeding),*** Interim Opinion Establishing Interim Rates for Pacific Bell Telephone Company's Unbundled Loop and Unbundled Switching Network Elements, D. 02-05-042, California Commission, at 2 and 17 (2002) ***(Interim*** *Rates* ***Interim Decision); see*** *also* ***California Commission Order*** at 119.

[56] ***Inrerim*** *Rates* ***Inrerim Decision*** at 2-3; ***see*** *also* ***Culfornia Commission Order*** at 119

[57] Letter from Geoffrey M. Klineberg, Esq., Counsel for Pacific Bell, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Sept. 30. 2002) (Pacific Bell Sept. 30 *Ex* ***Parre*** Letter) Attach. 3, *Joint Application of AT&T Communications of California, Inc. (U* ***5002 C) and*** *WorldCom, Inc.* ***for the Cornmission*** *to* ***Reexamine*** *the* ***Recurring*** *Costs* ***and Prices*** *of* ***Unbundled*** *Switching in* ***Its Firsr*** *Annual* ***Review*** *of* ***Unbundled*** *Switching in* ***Its Firsr*** *Annual* ***Review of Unbundled Network*** *Element* ***Costs Pursuant to Ordering Paragraph*** *11 of D. 99-11-050, et al.* ***(Consolidared*** *2001/2002* ***Relook Proceeding*** or ***Relook Proceeding).*** Interim Opinion Applying Pacific Bell Telephone Company Interim Switching Discounts to All Port Types. D. 02-09-052, California Commission. at 2 (2002) ***(All Porr Types*** *Interim Switching Discount* ***Decision).*** Specifically, the California Commission adopted an interim discount of 69.4 percent to Pacific Bell's Coin Port, Centrex Port, Direct Inward Dial (DID) Pon, DID number block, Integrated Services Digital Network (ISDN) Port, Trunk Pori Terminations (i.e., end office termination and tandem termination), and DSI Pon. The interim price reductions adopted in these rate cases became effective immediately and the interim rates were made subject to adjustment once the California Commission adopts final rates for Pacific Bell's unbundled loops and unbundled switching in the ***Relook Proceeding. Id*** at 11

unbundled dedicated transport, and signaling system 7 (SS7) links, as well as the loop and switch prices.[58]

24. On August 6,2002, the United States District Court for the Northern District of California determined that the California Commission had miscalculated the total direct costs of Pacific Bell's UNEs by douhle-counting Pacific Bell's nonrecurring costs when it calculated the shared and common cost markup percentage." Finding that the error unlawfully deflated Pacific Bell's markup from 21 percent to 19 percent, the court vacated and remanded to the California Commission its calculation of Pacific Bell's total direct costs of UNEs used in the markup, as well as those decisions that depended upon the incorrect calculation.[60] On September 19,2002, the California Commission, in response to the remand order, increased Pacific Bell's shared and common cost markup percentage from 19 percent to 21 percent.[61] In addition, concluding that the total direct UNE cost figure that the court remanded for review was also used to set Pacific Bell's monthly recurring charges, the California Commission directed Pacific Bell to remove 13 percent from the expense portion of its UNE recurring costs to correct the overstatement.[62]

25. On September 19,2002, the California Commission found that Pacific Bell had demonstrated that it provides nondiscriminatory access to unbundled network elements at just and reasonable rates, terms and conditions.[63] The California Commission therefore concluded that Pacific Bell satisfied the requirements of checklist item two.[64] The California Commission also stated that it would move steadfastly in its consolidated ***Relook Proceeding*** to adopt

---

58 Pacific Bell Application App. K, Vol. 10, Tab 52, Consolidared *2001/2002* Relook Proceeding, *Scoping* Memo *for* Consolidated *2001/2002* Unbundled ***Network Element (UNE) Reexamination for Pacific Bell*** Telephone Company, California Commission (2002) ***(Scoping*** Memo); ***see also*** Pacific Bell Vandeloop Aff. at para. 29.

59 Pacific Bell Application App. K. Vol. 10, Tab 55, *AT&T Communications of California.* Inc. v. *Pacific Bell Tel.* Co., No. C01-02517 CW, slip op. at 36-38 (N.D. Cal. Aug.6. 2002) (*AT&T v. Pacific Bell Remand Order*); *see also* Pacific Bell Sept. 30 *Ex* Parre Letter Attach. 2, Consolidared *2001/2002* Relook Proceeding, Opinion on Remand Addressing Shared and Common Cost Markup Established in Decision 99-11-050 and Unbundled Network Element Recurring Prices, D. 02-09-049, California Commission, at 7 (2002) (*Shared and Common Cost* Markup Remand).

60 *AT&T v. Pacific Bell Remand Order*, slip op. at 25-33.

61 Shared and Common *Cosr* Markup Remand at 18 and ordering para. no. 1. The percentage markup was made effective immediately. *Id.* at 18.

62 *Id.* at 3, Conclusion of Law No. 10, and ordering para. no. 2. The changes the California Commission adopted to Pacific Bell's shared and common cost markup and to the expense portion of its UNE recurring costs were made effective immediately (i.e., September 19, 2002), but implementation of the rate changes was stayed pending a final determination by the California Commission of the actual rate changes. Id. at 2-3, and Conclusion of Law Nos. 16 and 17.

63 *California Commission* Order at 120, Finding of Fact No. 180, and Conclusion of Law No. 43; *see also* id., Finding of Fact No. 178.

64 *Id.* at 120, and Conclusion of Law *No.* 44

permanent rates to replace the interim adjustments made to Pacific Bell's switching and loop rates."

b. Discussion

(i) Complete-As-Filed Requirement

26. Before evaluating Pacific Bell's compliance with the requirements of section 271, we discuss why we accord evidentiary weight to a rate reduction that it filed on day **45.** The Commission maintains certain procedural requirements governing section 271 applications. In particular, the "complete-as-filed" requirement provides that when an applicant files new information after the comment date, the Commission reserves the right to start the 90-day review period again or to accord such information no weight in determining section 271 compliance. We maintain this requirement to afford interested parties a fair opportunity to comment on the BOC's application, to ensure that the Attorney General and the state commission can fulfill their statutory consultative roles, and to afford the Commission adequate time to evaluate the record. The Commission can waive its procedural rules, however, "if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."[66]

27. We waive the complete-as-filed requirement on our own motion pursuant to section 1.3 of the Commission's rules to the extent necessary to consider the rate reduction filed by Pacific Bell on day 45.[67] We conclude that the special circumstances before us here warrant a deviation from the general rules for consideration of late-filed information or developments that take place during the application review period. In particular, as we discuss below, we find that the interests our normal procedural requirements are designed ***to*** protect are not affected by our consideration of the late-filed rate reduction. In addition, we also conclude that consideration of the rate reductions will serve the public interest. We will continue to enforce our procedural requirements in future section 271 applications, however, in the absence of such special circumstances, in order to ensure a fair and orderly process for the consideration of section 271 applications within the 90-day statutory deadline.

28. There are special circumstances here that satisfy the first element of the test for grant of a waiver. At the time Pacific Bell filed its application with us on September 20, 2002, the California Commission had approved the rate for DS3 loops but had decided to include the rate as part of its *Relook Proceeding* because it believed the rates were based on outdated cost information. Pacific Bell proposed a DS3 rate of $573.20 to the California Commission for its rate submission in the *Relook* ***Proceeding,*** but did *so* after it filed its section 271 application and

---

[65] *Id.* at 120

[bb] *Northeast Cellular* ***Telephone*** Co. *v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. *1990); WAIT Radio v. FCC,* 418 F.2d 1153 (D.C. Cir. 1969). *See also* 47 **U.S.C.** § 154(j); 47 C.F.R. § 1.3.

[67] Pacific Bell Application Reply App., Tab 17. Affidavit of Linda **S.** Vandeloop (Pacific Bell Vandeloop Reply **Aff.)** at para. 16.

after comments were due in this proceeding. Thus, it was not possible for Pacific Bell to lower its DS3 loop rate to its proposed rate in the *Relook Proceeding* until after it would run afoul of our complete-when-filed requirement. Pacific Bell asserts in its brief that it believes it is likely that new rates will be adopted for those elements at the conclusion of the ***Relook*** *Proceeding.* Pacific Bell admits that this lower rate "is likely the rate ceiling for the [California Commission]'s ultimate determination."[68]

29. Second, interested parties have had an opportunity to evaluate the new rates and to comment. Pacific Bell filed its rate change with its reply comments on day 45, and XO, the party that raised the issue, has commented on it.[69] This fact, taken with the fact that the rate adjustment was limited to the reduction of a single UNE, demonstrates that it was not unduly difficult for commenters to respond to Pacific Bell's actual reduction or Commission staff to evaluate the change within the 90-day review period. The Department of Justice did not comment on the modified rate. but in its initial comments states that it "defers to the Commission's ultimate determination of whether the prices supporting this application are appropriately cost-based."[70] Because the Commission and commenters have had sufficient time and information to evaluate Pacific Bell's application, we see no need to restart the 90-day clock.

30. Finally, in this instance, Pacific Bell has responded to criticism in the record by taking positive action that will foster the development of competition. This is very different from the situation in which late-filed material consists of additional arguments or information concerning whether current performance or pricing satisfies the requirements of section 271. In addition. this application is otherwise persuasive and demonstrates a commitment to opening local markets to competition as required by the 1996 Act.

31. We conclude that grant of this waiver will serve the public interest and thus satisfy the second element of the waiver standard In particular, grant of this waiver permits the Commission to act on this section 271 application quickly and efficiently without the delays inherent in restarting the 90-day clock. Grant of this waiver also serves to credit Pacific Bell's decision to respond positively to criticism in the record concerning its rate levels by making a pro-competitive rate reduction. Given that interested parties have had an opportunity to comment on the rate reduction, we do not believe that the public interest would be served in this instance by strict adherence to our procedural rules. Nor do we need to delay the effectiveness of this Order, as we did in the *SWBT Kansas/Oklahoma* ***Order."*** In contrast to that situation, here

---

[68] Pacific Bell Application Reply App., Tab 17, Affidavit of Linda S. Vandeloop (Pacific Bell Vandeloop Reply Aff.) at para. 16.

[69] ***See*** Lener from Cathleen Massey, Vice President, XO Communications, Inc., to Magalie Roman Salas. Secretary, Federal Communications Commission, WC **Docket** No. 02-306 (filed Nov. 12, 2002) (XO Nov. 12 *Ex Parte* Letter).

[70] Depamnent of Justice Evaluation at 6-8

[71] *SWBT Kansas/Oklahoma* ***Order.*** 16 FCC Rcd at 6249-50, paras. 26-27.

the California Commission dictated the timing by its reevaluation of the DS3 loop rate in its ongoing rate proceeding. As we have made clear above, however, we do not intend to allow a pattern of late-filed changes to threaten the Commission's ability to maintain a fair and orderly process for consideration of section 271 applications.

(ii) Application of TELRIC Standard

32. Based on the evidence in the record, we find that Pacific Bell's charges for UNEs made available to other telecommunications carriers are just, reasonable, and nondiscriminatory in compliance with checklist item two. As discussed above, we waive our "complete-when-filed" rule in the unique circumstances presented by this application to consider Pacific Bell's reduced DS3 loop rates as evidence of compliance with checklist item two.

33. As an initial matter, we find that the California Commission followed basic TELRIC principles. We disagree with AT&T's assertion that the California Commission never made an affirmative finding that California rates are TELRIC-compliant." The California Commission stated that "[w]e have and shall continue to adopt cost-based, TELRIC compliant IJNE rates in California. We have made interim adjustments where we have found the most significant disparities, and will move to adopt permanent rates."" As discussed above, the orders of the California Commission provide numerous indicia that it followed a forward-looking approach that is consistent with TELRIC. We find that the California Commission has demonstrated an admirable and consistent commitment to TELRIC principles and has worked diligently to set UNE rates at TELRIC levels.

34. We also find that the California Commission properly applied the TELRIC methodology and applicable Commission precedent regarding several issues disputed by the commenters. Specifically, we disagree with AT&T's assertion that Pacific Bell should fail this checklist item because some of its UNE rates are based on outdated cost information." AT&T asserts that the California Commission last approved permanent rates in 1998, based on 1997 cost studies that relied on 1994 data." To begin with, the issue of outdated data is not particularly relevant to those rates to which we apply our benchmark analysis. That is, because our benchmark analysis allows us to find that a rate in dispute in a section 271 application under consideration is TELRIC-compliant if it is less than the benchmark rate, taking into account different underlying costs, the issue of "old age" relates, not to the disputed rate, but to the benchmark rate. And, as explained more fully below, we find that no challenger has presented

---

72 AT&T Comments at 15-17, 26-27.

73 *California Commission Order* at *120*

74 AT&T alleges that signaling, transport, collocation. and nonrecurring rates violate TELRIC because they are based on outdated cost data. *See* AT&T Comments at 15-18.

75 *Id*

evidence so strong that the benchmark rates are so unreasonably outdated that we should conclude that they do not continue to serve as a reasonable benchmark.[76]

35. We also conclude that challengers do not present evidence so strong that the non-benchmarked rates are so unreasonably outdated thar we should conclude that they are not TELRIC-compliant. Although we recognize that the court's analysis in ***WorldCom*** focused on rates subject to a benchmark analysis, we believe that the same analysis applies to rates not subject to a benchmark analysis, because the same rate-setting process. which takes substantial amounts of time, is required. In *WorldCom*, the D.C. Circuit upheld the Commission finding that Verizon's rates in Massachusetts were TELRIC-compliant. It recognized that a "lag" between the time period in which costs declined and the time a state commission modifies its rates to reflect changing costs is "both unavoidable and perhaps even desirable."[77] The court continued: "[i]n *AT&T* we recognized that a state's TELRIC rates could not always reflect the most recently available information, since rate determinations consume substantial periods of time and cannot be constantly undertaken."[78] As the court stated, "the mere age of a rate doesn't render the FCC's reliance on it unreasonable."[79] The court, however, noted that "[a]t some point, [an argument that rates are outdated] plainly must become a winner."" That point, according to the court, occurs when rates become "ancient" in "a market with falling costs," or "have been based on fraudulent ILEC submissions," or a "challenger. . . tender[s] evidence of . . . unreasonableness [with regard to the rates] *so* strong as to preclude FCC approval without a hearing."" In regard to the issue of "old rates," the court specifically stated that, even where the Commission made no explicit findings with regard to the rates at issue, "it adopted what is likely a far more workable approach to the problem of timeliness – namely, reliance on the state's own processes of rate revision and correction."[82]

36. We find that the California Commission has demonstrated its commitment to setting UNE rates at TELRIC levels, and we are confident that it will modify rates appropriately if presented with adequate evidence that costs have declined. The annual ***Relook Proceeding*** is the appropriate forum for AT&T to raise its claim that certain UNE rates are based on outdated cost information. We find that AT&T has presented insufficient evidence for us to conclude that

[76] *See WorldCom v FCC*, 308 F.3d 1, 8 (D.C. Cir. 2002) (*WorldCom*).

[77] *Id.*

[78] *Id.* (citing *AT&T v FCC*, 220 F.3d 607, 617-18 (D.C. Cir. 2000)).

[79] *Id.*

[80] *Id.* at 7.

[81] *Id.*

[82] *Id.* at 8.

certain of Pacific Bell's UNE rates violate TELRIC because they are based on old data and we rely on the California Commission's "own processes of rate revision and correction.""

37. Moreover, we find that the California Commission's use of interim rates does not violate our rules or basic TELRIC principles. In the *SWBT **Texas Order,*** the Commission found that "the mere presence of interim rates will not generally threaten a section **271** application so long as an interim solution to a particular rate dispute is reasonable under the circumstances, the state commission has demonstrated its commitment to our pricing rules, and provision is made for refunds or true-ups once permanent rates are set."[84] The California Commission is currently re-examining loop and switching rates according to its scheduled ***Relook Proceeding,*** and expects to set new permanent rates in the near future. Given that the California Commission follows TELRIC principles, we have confidence that the permanent rates will comply with our rules." The interim rates, which are lower than the permanent rates they replace, encourage competitive entry while the California Commission examines updated cost information. Additionally, the interim rates are subject to true-up. We thus find that the interim rates in California conform to our guidelines and are "reasonable under the circumstances."

38. We disagree with AT&T's assertion that Pacific Bell's switching and loop rates, which were set by the California Commission on **an** interim level, are not TELRIC-compliant but were obtained by applying a few "rough cut" discounts to the old loop and switching rates.[86] AT&T also contends that the Commission has approved interim rates in prior section 271 cases only when a few UNE rates were interim and the vast majority of rates, particularly those comprising the UNE-P, were set on a permanent basis, which is not the case in California.[87] As

---

[83] ***Id***

[84] ***SWBT Texas Order,*** 15 FCC Rcd at 18394, para. 87

[85] Additionally, the California Commission's actions in response to its problems with Pacific Bell's actions in the state rate case are similar to the Kansas Commission's actions in a prior 271 order. In the *SWBT **Kansas/Oklahoma Order,*** the Commission approved a voluntary, across-the board discount to nonrecurring rates in light of the fact that the state commission's rate-setting efforts "were hampered by carriers' failure to follow its directions in running their respective cost studies." *SWBT **Kansas/Oklahoma Order,*** 16 FCC Rcd at 6267, para. 60. The Commission's actions were upheld by the D.C. Circuit Court of Appeals. ***Sprint** v. FCC*. Here, the California Commission found that it was hampered in its efforts to set switching and loop rates by Pacific Bell's refusal to follow the state commission's instructions to file updated versions of its cost model and to supply its cost model in a form that other carriers could understand and replicate. ***Interim** Rates **Interim** Decision* at 10-12. The California Commission found that Pacific Bell's deficient cost filing "left a muddle" due to the "inadequacies of [its] cost filing," ***Interim** Rates **Interim** Decision* at 16, and it granted the request for interim rates filed by AT&T and WorldCom.

[86] Specifically, the interim loop rates were generated by varying a small subset of inputs used in the HAI Model 5.2a – the model proposed by AT&T and WorldCom – to estimate the magnitude of loop cost declines. *See* AT&T Comments at 16-17; ***see** also* Letter from Christopher T. Shenk, **Esq.,** Counsel for AT&T Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket **No.** 02-306 at 2 (filed Nov. 26, 2002) (AT&T Nov. 26 Shenk *Ex **Parte*** Letter).

[87] AT&T Comments at 30

discussed, we find the California Commission's actions to be reasonable under the circumstances, to conform to other circumstances in which we have approved interim rates, and to be a pro-competitive step while the state commission examines new cost data. We take additional comfort in the fact that Pacific Bell has voluntarily agreed to a cap on its rate recovery that will not allow the rates to go any higher than rates that will benchmark to its rates in Texas, even if the California Commission adopts modified rates that would allow Pacific Bell to charge these higher rates.[88]

39. We disagree with AT&T's claim that Pacific Bell's interim rate reductions are not sufficient to bring its recurring loop and switching rates into a reasonable TELRIC range." As discussed below, the interim rates pass a benchmark to SWBT's Texas rates, which provides us with assurance that the switching and loop rates fall within a reasonable TELRIC range.

40. We also disagree with AT&T's assertion that Pacific Bell's interim rates are "sham" and are part of a "bait-and-switch" strategy.[90] AT&T asserts that Pacific Bell has submitted cost studies to the California Commission as part of its ongoing rate case to support rates higher than the existing interim rates." AT&T contends that such submissions are proof that Pacific Bell intends to obtain section 271 approval based on lower rates but will implement much higher rates after it obtains such approval."

41. We have previously held that a BOC's submission of new cost data in an ongoing rate case does not prove that existing rates are outside a TELRIC range.[93] Additionally, we do not find that the existence of a pending UNE rate investigation alters our analysis of Pacific Bell's section 271 application. As we have noted previously, we perform our section 271 analysis based on the rates before us.[94] If, as is the case here, we find that Pacific Bell's rates in California pass the checklist requirements, then Pacific Bell has met its section 271 obligations. If Pacific Bell were to raise its UNE rates in the future above the range that a reasonable application of TELRIC principles would produce, such rates might contravene the requirements

---

88 *See* Pacific Bell Vandeloop Reply Aff. at paras. 14-15

89 AT&T Comments at 16-17, 29-30.

90 ATBLT Nov. 26 Shenk *Ex Parte* Letter at 3. *See also* Letter from Stephen Gum, Vice President, Working Assets Funding Service, Inc., to Michael K. Powell, Chairman, Federal Communications Commission, WC Docket No. 02-306 (tiled Dec. 4,2002).

91 *Id.*

92 *Id.*

93 *Joint Application by BellSouth Corpororion, BellSouth Telecommunicafions,Inc., ond BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana,* CC Docket No. 02-35, Memorandum Opinion and Order, 17 FCC Rcd 9018, 9066 at para. 96 (2002) (*BellSouth Georgia/Louisiana Order).*

94 *See BellSouth Georgia/Louisiana Order,* 17 FCC Rcd at 9066-67. para. 97 (*citing Verizon* Rhode *Island Order,* I7 FCC Rcd at 3317, para. 31).

of section 271. We cannot assume, however, that the rates Pacific Bell proposed to the California Commission in the *Relook Proceeding* are not cost justified or that the California Commission would approve rates that violate TELRIC. Additionally, section 271 provides a mechanism for parties to challenge any UNE rates as being outside a reasonable TELRIC range.[95] Under section 271(d)(6)(A), we have the authority to review any future rate increases implemented by Pacific Bell.[96] If we determine that future rate increases are not TELRIC compliant, we may suspend the rates, revoke Pacific Bell's section 271 authority, or impose other penalties.[97]

42. In response to concerns raised by some commenters and the Department of Justice that Pacific Bell has not provided sufficient detail of its true-up commitment, Pacific Bell clarifies that it has committed to a cap on the amount of the true-up. Pacific Bell's commitment is to true up to rates no greater than rates that would pass a benchmark analysis to current Texas rates.')' As a result, Pacific Bell commits that competitive LEC entering the California market will not pay more than $18.52 for the UNE-P during the period interim rates are in effect, no matter what rate revisions are adopted by either the Texas or California Commission.[99] The true-up will occur after the California Commission sets permanent rates and will be calculated in the same manner that benchmarked rates are calculated, that is, by comparing weighted average California rates based on California state-specific usage figures to weighted average Texas rates based on Texas state-specific usage figures.[100] Should a competitive LEC believe that Pacific Bell's application of its true-up commitment results in Pacific Bell's California loop or non-loop rates not meeting a benchmark to the comparable rates in Texas, the competitive LEC should file a complaint with the Commission under section 271(d)(6) of the Act.'"

43. We note that commenters allege specific TELRIC violations not addressed above.'" Even assuming, *arguendo*, that these claims are correct and that the specific inputs do

---

95 47 U.S.C. § 271(d)(6)(B).

96 47 U.S.C. § 271(d)(6)(A).

97 47 U.S.C. § 271(d)(6)(A).

98 Pacific Bell Vandeloop Aff. at n.67 and Reply Aff. at paras. 14-15. That is, because California costs are eleven percent below Texas costs, Pacific Bell will base its true-up on rates no higher than eleven percent lower than current Texas rates. Pacific Bell Vandeloop Reply Aff. at paras. 14-15.

99 *Id.* Pacific Bell's commitment is premised on the use of three vertical features: call waiting, caller ID and 3-way calling. *See* Pacific Bell Vandeloop Reply Aff. at para. 14 and n.37. It is unclear what a competitive LEC would pay while the interim rates are in effect if it purchases more than three vertical features.

100 *See* Pacific Bell Vandeloop Aff. at paras. 49-SO; *see also* Pacific Bell Application App. A, Tab 14, Affidavit of Thomas J. Makarewicz (Pacific Bell Makarewicz Aff.) at paras. 13-17.

101 See 47 U.S.C. 271(d)(6)

102 AT&T alleges that Pacific Bell should not he allowed to benchmark its rates because the California Commission violated TELRIC principles when it refused to calculate DSI and DS3 lines as voice-grade equivalents (continued.. ..)

not comply with TELRJC, we conclude that the alleged errors do not yield an end result outside a TELRIC-based range when the interim rates are considered.[103] After comparing relevant rates and costs in California with those in Texas, we conclude that the California Commission's calculations result in rates that a reasonable application of TELRIC would produce.'"

(iii) Dedicated Transport

44. We find that RCN fails to allege a TELRlC violation that would cause Pacific Bell to fail this checklist item. RCN asserts that it wants Pacific Bell to clarify that its dedicated transport rates are TELFUC-compliant because RCN has had problems with Verizon in other states.'" RCN also asserts that Pacific Bell's CNAM rate, for its Calling Name database, is higher than Verizon's corresponding rates in New **York.** Pacific Bell responds that Verizon's practices are irrelevant for purposes of a Pacific Bell application, but that it does allow competitive LECs to order cost-based transport and that the California Commission approved its CNAM rate as TELRIC-compliant.[106] We agree with Pacific Bell that concerns about transport rates offered by another BOC do not prove that Pacific Bell does not offer TELRIC-based rates in California. Moreover, RCN has failed to proffer evidence that persuasively rebuts Pacific Bell's showing of TELRJC compliance, instead making general assertions that another BOC in another state has different rates. We find that Pacific Bell offers dedicated transport at rates that fall within a reasonable range of what the application of TELRIC principles would produce.

(iv) DS1/DS3 Loop Rates

45. *DS1/DS3 Loop* ***Rules.*** We are not persuaded by the allegations of several commenters that Pacific Bell's DSI and DS3 loop rates violate TELRIC. In 1999, the California Commission approved rates for DSI loops, DS1 entrance facilities, and DS3 entrance facilities.'" The DS3 entrance facilities price was subsequently used to establish a DS3 loop price.[108] The California Commission is currently reexamining rates for DSI and DS3 loops in the ***Relook***

(Continued from previous page)
and instead counted copper pair and **DS3** ***as*** a single line and each **DS1** ***as*** *two* lines. AT&T Comments at 18-19. AT&T asserts that this method of counting lines does not address the substantial rate inflation caused by the fact that Pacific Bell's rates are based on outdated data. including line count data. *Id.* AT&T also asserts that the manner in which vertical feature costs are recovered violates TELRIC. *Id.* at 27-28.

[103] ***See*** *Verizon Pennsylvania* ***Order,*** 16 FCC Rcd at 17456, para. 61

[104] See section IV(A)(1)(b)(v), *infra* (benchmark section).

[105] PacWest, RCN, and TelePacific Comments at 34-36.

[106] Pacific Bell Reply Vandeloop Aff. at para. 9.

[107] *OANAD* ***Pricing*** Decision at 104-09, 259-60

[108] *See* Pacific Bell Application App. **A,** Tab 19, Affidavit of Richard L. Scholl (Pacific Bell Scholl Aff.) at para. 113.

Proceeding. Pacific Bell asserts that the current loop rates are TELRIC-compliant.[109] In order to "eliminate any concerns" about the current rates for these elements, however, Pacific Bell committed to treat the current DSI and DS3 loop rates as interim from the date of the filing of its section 271 application, subject to true-up to the final rates set by California Commission."'

46. XO contends that the DS3 price is the highest-price comparable loop in the nation, is more that three times higher than the comparable price in Texas, and is not geographically deaveraged."' XO also asserts that Pacific Bell's retroactive true-up to a future date when the California Commission conducts a cost hearing is inadequate, as the high rates currently foreclose market entry.[112] AT&T asserts that the rates for Pacific Bell's DSI and DS3 lines violate TELRIC because they are based on severely outdated cost information from 1994 and are not computed on forward-looking principles.[113] XO and AT&T also dispute Pacific Bell's contention that the DS3 rates were scrutinized and set by the California Commission."' AT&T asserts that the California Commission stated in its ***Scoping Memo,*** which outlines issues to be considered in the ***Relook Proceeding,*** that Pacific Bell's DS3 loop rates were set using DS3 entrance facilities as a proxy, and that the underlying costs were not reliable."'

47. In its reply comments, Pacific Bell notes that it submitted cost justification in the ***Relook Proceeding*** for a DS3 loop rate that is lower than its current DS3 loop rate, and admits that its lower proposal "is likely the rate ceiling for the [California Commission]'s ultimate determination."[116] Consequently, Pacific Bell filed an "accessible letter" with applicable competitive LECs on November 1, 2002, offering the lower DS3 loop rate."' Thus, Pacific Bell now offers this lower DS3 loop rate on an interim basis, subject to true-up, until the California Commission establishes permanent rates in its reexamination proceeding, or until it is no longer required to make the DS3 loop available as a UNE.[118] Pacific Bell asserts that in the ***Relook***

---

109 Pacific Bell Vandeloop Reply Aff. at para. 16.

110 Pacific Bell Application at 33; App. G, Tab 57, SBC Accessible Lener CLECC02-267 (Sept. 13, 2002).

111 XO Comments at 6-13.

112 ***Id.*** **at** 7, **11-15.**

113 AT&T Reply Comments at 9-10.

114 XO Comments at 6; AT&T Reply Comments at n.17.

115 AT&T Reply Comments at n.17.

116 Pacific Bell Vandeloop Reply Aff. at para. 16.

117 *Id.*

118 *Id.* Pursuant to Pacific Bell's Accessible Letter CLECC02-302, the reduced DS3 rate of $573.20 will become effective on the date the Accessible Lener is approved by the California Commission, which, under normal circumstances, occurs thirty days after its tiling with the California Commission, unless the California Commission rejects the rate. *Id.* at Attach. **A.**

Proceeding, it has submitted cost justification for a DSI loop rate that is higher than its current rate, and thus it does not believe that any further adjustments to its current DS1 loop rate are appropriate."'

48. We find Pacific Bell's voluntary discounting of its DS3 rate to be a reasonable step designed to address our concerns and encourage competitive entry. Prior to Pacific Bell's voluntary discounting of its DS3 loop rates, the DS3 loop rate **was** among the highest in the nation."' Even assuming. *arguendo.* that this high rate was caused by the TELRIC violations alleged by XO and AT&T, we find that Pacific Bell's voluntary reduction assures **us** that its DS3 loop rate is within a range of what the reasonable application of TELRIC would produce.'*' We note that the interim reduced rate of $573.20 is less than the current comparable Texas DS3 loop rates of between ***$665*** and $966.[122] The California Commission is reviewing this rate as part of its ***Relook*** *Proceeding,* and is thus subject to the state's process of "rate revision and correction."'' Moreover, we find further assurance in the fact that these rates are interim and subject to true-up.[124]

49. We also reject *XO's* contention that **a** slight delay in the implementation of Pacific Bell's voluntary rate reduction of its DS3 rate should cause it to fail this checklist item. XO asserts that, due to California Commission procedures, the accessible letter offering the discounted DS3 loop rate was filed with the state commission on November **14,** 2002 but the rate **was** not available until December 14, 2002.[125] **As** discussed above, we find that Pacific Bell's offering of the lower DS3 loop rate on an interim basis is a pro-competitive step designed to encourage entry and respond positively to the assertions raised by several parties about this

---

[119] *Id.* at **n.44.**

[120] *See* XO Comments at 6

[121] We reject AT&T's assertion that the DS3 rate violates TELRIC because the California Commission used DS3 entrance facility rates as a proxy for DS3 loop rates. AT&T Reply Comments at **n.17.** Pacific Bell responds that the California Commission set this price after Pacific Bell provided evidence that the **DS3** entrance facility and the design ofthe DS3 loop were identical. Pacific Bell Reply at 25. As discussed above, we do not conduct a ***de novo*** review of a state's ratemaking decisions, but will reject an application only **if** basic TELRIC principles are violated or rhe state commission makes clear errors on substantial factual findings. *Verizon Pennsylvania* ***Order,*** 16 FCC Rcd at **17453,** para. 55. Here, AT&T fails **to** meet its burden in proving either of these circumstances.

[122] *See* Letter from Geoffrey M. Klineberg, **Esq.,** Counsel for Pacific Bell, to Marlene H. Dortch, Secretary, Federal Communications Commission at 6 (tiled Nov. 13, 2002) (Pacific Bell Nov. 13 *Ex* ***Parre*** Letter).

[123] *WorldCom*, 308 F.3d at **8**

[124] ***See*** our discussion o f interim rates, section IV(A)(1)(b)(ii), *supra*

[125] XO Nov. 12 *Ex* ***Parre*** Letter at 2; Letter from Colin S. Stretch, Counsel for Pacific Bell, to Marlene **H.** Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-306 at Attach. 3, n.5 (filed Nov. 14,2002) (Pacific Bell **Nov. 14** *Ex Parre* Letter).

rate.[126] Pursuant to California Commission policy, the rate went into effect on December 14, 2002, thirty days after the first agreement implementing the rate was filed."' We do not find the brief implementation delay cited by XO to be unreasonable, nor does it cause Pacific Bell to fail this checklist item.[128]

50. XO also asserts that in Pacific Bell's accessible letter offering its voluntarily-discounted DS3 loop rate, Pacific Bell inserts language stating that if the Commission or another relevant regulatory body determines that incumbent LECs are no longer required to offer high-capacity loops on an unbundled basis, the discounted rate will be invalidated.[129] To the extent that such language causes concern, we nevertheless conclude that its presence is not so unreasonable to warrant denial of Pacific Bell's application. We note that one carrier, DSLnet, agreed to the terms contained in this agreement.'" Had the terms been so unreasonable and onerous, we doubt that any party would have agreed to them. We *take* additional comfort in the fact that Pacific Bell has subsequently offered a new agreement, not yet in effect, that XO, the only party to raise this issue, has agreed to take."' XO states that it finds the modified change of law language acceptable.[132] Should the California Commission approve this agreement, it will be available to all competitive LECs.

51. We do not agree with XO's assertion that Pacific Bell should fail this checklist item because the DS3 rate is not geographically deaveraged.[133] The California Commission recently began the process of deaveraging some of Pacific Bell's UNE rates. In March, 2002, the California Commission approved a settlement agreement that deaveraged several UNE loop rates into three zones on an interim basis, pending final review in its ***Relook*** *Proceeding*.[134] DS1 loop

---

126 ***See*** section IV(A)(1)(b)(i), *supra*

127 ***See*** Letter from Colin S. Stretch, Counsel for Pacific Bell, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docker No.02-306 (filed Dec. 16,2002) (Pacific Bell Dec. 16 *Ex Parte* Letter).

128 Because we find that a brief delay to implement Pacific Bell's "accessible letter" is reasonable, we do not consider XO's alternate implementation proposals. ***See*** **XO** Nov. 12 *Ex Parte* Letter at 2-3.

129 ***Id.*** at 3-4.

130 ***See*** Pacific Bell Dec. 16 ***Ex Purle*** Letter

131 *See* Pacific Bell Dec. 13 *Ex* ***Parre*** Letter at 2-3 and Attach. 3

132 ***See*** XO December 10 *Ex Parte* Letter.

133 XO Comments **at 8**

134 Pacific Bell Application App. C, Vol. 9, Tab 75, ***Order Instituting Investigation*** *on /he* ***Commission's Own Morion*** *into the Deaveraging* ***of Unbundled Network Element Rates*** *within at Least* ***Three Geographic Regions*** *d the State* ***of California*** *pursuant* ***io Federal Communicorions Commission Rule*** *47* ***C.F.R. Seclion*** *51.507(f)*, I.00-03-002, Order Adopting Geographically Deaveragcd Unbundled Network Element Rates for Pacific Bell Telephone Company, 02-02-047, California Commission at 13 (2002) ***(Order Adopting Geographically Deaveraged Rates)***.

rates were deaveraged as part of this settlement.[135] It does not appear that parties requested deaveraging of DS3 loop rates in that proceeding.[136] The California Commission has granted XO's request that it review DS3 loop rates in its ongoing ***Relook Proceeding."'*** We have previously stated that we are reluctant to deny a section 271 application because a BOC is engaged in an unresolved rate dispute with its competitors before the state commission, which has primary jurisdiction over the matter."' Here, we believe that XO's request for rate deaveraging is a local arbitration decision for the California Commission in the first instance. We have confidence in the California Commission's ability to review XO's request for review and set the DS3 rates on a geographically-deaveraged basis consistent with our rules.

52. We are not persuaded by those commenters who allege that Pacific Bell's DSI rates violate TELRIC.[139] The California Commission set the DS1 rate according to TELRIC principles."' It is currently reviewing these loop rates as **part** of its ***Relook Proceeding,*** and we have confidence in its ability to modify the rate according to TELRIC principles if necessary. We take additional comfort in the fact that this rate is subject to true-up. Additionally, we do not believe that the California loop rate **is** based on such outdated cost data that it violates TELRIC. No commenter presents a specific assertion as to how the alleged staleness of the underlying cost data affects the rate, such as evidence of significant cost declines. **As** discussed in greater detail above, the D.C. Circuit recently held that "it is reasonable for the FCC to rely on the states' periodic rate revision process as a means of correcting flaws in adopted rates.""' The court further found that it will reverse the Commission's judgment only if it sufficiently disregarded the rate's age "so as to adopt rates that were unreasonably outdated.""' Here, no commenter meets its burden in proving sufficient evidence that this rate is so unreasonably outdated that it violates TELRIC, and we rely on the California Commission's ability to modify this rate if necessary.

53. We are not persuaded by *XO's* contention that SWBT's DS1 rate in Texas, which is not significantly higher than Pacific Bell's DSI rate in California, proves that the California rate is outside a reasonable TELRIC range.'" The Commission has repeatedly held that a simple

---

135 *Id.* at Attach. B.

136 ***Id.***

137 ***Scoping Memo*** at ***5-6.***

138 ***SWBT Arkansas/Missouri Order,*** 16 FCC Rcd **at** 20754, para. 73

139 AT&T **Reply Comments** at 9-10. XO *Comments* ***at*** 5-14, XO Nov. 12 *Ex Parte* Letter ar 4

140 *OANAD* ***Pricing*** *Decision* at 104-106, 259-60.

141 ***WorldCom, 308*** F.3d at 8.

142 *Id.*

143 **XO** Comments ***at*** 15-16.

comparison of rates in various states is not evidence that a rate violates TELRIC."[144] We find that no commenter meets its burden in proving that this rate is outside a TELRIC range.

(v) Benchmark Comparison

54. States have considerable flexibility in setting UNE rates and certain flaws in a cost study, by themselves, may not result in rates that are outside the reasonable range that correct application of TELRIC principles would produce."[145] The Commission has stated that, when a state commission does not apply TELRIC principles or does so improperly (e.g., the state commission made a major methodological mistake or used an incorrect input or several smaller mistakes or incorrect inputs that collectively could render rates outside the reasonable range that TELRIC would permit), then **we** will **look** to rates in other section 271-approved states to see if the rates nonetheless fall within the range that a reasonable TELRIC-based rate proceeding would produce.[146] In comparing the rates, the Commission has used its USF cost model to take into account the differences in the underlying costs between the applicant state and the comparison state."[147] To determine whether **a** comparison with a particular state is reasonable, the Commission will consider whether the two states have a common BOC; whether the two states have geographic similarities; whether the two states have similar, although not necessarily identical, rate structures for comparison purposes; and whether the Commission has already found the rates in the comparison state to be TELRIC-compliant.[148]

---

[144] ***See*** *Applicarion by Verizon New EnglandInc., Bell Arlanric Communicarions, Inc. (d/b/a Verizon Long Disrance), NYNEX Long Disrance Company (d/b/a Verizon Enrerprise Solutions), Verizon Global Networks Inc., and Verizon Select* **Services** *Inc., for Authorization To Provide /***n-Region,** *InterLATA Services* **in** *Vermont.* CC Docket No. 01-7, 17 FCC Rcd 7625,7639-40, paras. 26, 27 (2002) *(Veriion Vermont Order); Veriion New Jersey* Order, 17 FCC Rcd at 12,301, para. 59.

[145] *Applicarion by Verizon New England Inc., Verizon Delaware Inc., Bell Atlantic Communicarions, Inc. (d/b/a Verizon Long Disrance), NYNEX Long Distance Company (d/b/a) Verizon Enrerprise Solurions). Veriion Global Networks Inc., and VerizonSelect Services Inc., for Authorization to Provide In-Region, InterLATA Services in New Hampshire and Delaware.* WC Docket No. 02-157, FCC 02-262, Memorandum Opinion and Order at para. 39 (2002) *(Verizon New Hampshire/Delaware Order); Verizon Rhode Island Order,* 17 FCC Rcd at 3319-20, para. 37.

[146] *Verizon New Hampshire/Delaware Order* at para. 39; ***see*** *also Veriion Rhode Island Order,* 17 FCC Rcd at 3319-20. para. 38; *Verizon Pennsylvania Order,* 16 FCC Rcd at 17456-57, para. 63; *SWBT Kansas/Oklahoma Order,* 16 FCC Rcd at 6276, para. 82. In the *Pennsylvania Order,* **we** found that several of the criteria should be treated as indicia of the reasonableness of the comparison. *Verizon Pennsylvania Order,* 16 FCC Rcd at 17457, para. 64.

[147] **See** *Verizon Massachusetts Order,* 16 FCC Rcd at 9000, para. 22; *SWBT Arkansas/Missouri Order,* 16 FCC Rcd **at** *20746,* para. *57; VerizonPennsylvania Order,* 16 FCC Rcd at 17457, para. *65;* see *also SWBT Kansas/Oklahoma Order,* 16 FCC Rcd ***at*** 6277, para. 84.

[148] ***See*** *Verizon Rhode Island Order,* 17 FCC Rcd at 3320, para. 38; *SWBT Arkansas/Missouri Order,* 16 FCC Rcd at 20746, para. 56: *Verizon Pennsylvania Order,* 16 FCC Rcd at 17457, para. 63; *Verizon Massachusetts Order,* 16 FCC Rcd at 9002, para. 28; *SWBT Kansas/Oklahoma Order,* 16 FCC Rcd at 6276, para. 82.

55. In conducting a benchmark analysis, we consider the reasonableness of loop and non-loop rates separately.[149] Where the Commission finds that the state commission correctly applied TELRIC principles for one category of rates, it will use a benchmark analysis to evaluate the rates of the other category. If, however, there are problems with the application of TELRIC for both loop and non-loop rates, then the same benchmark state must be used for all rate comparisons to prevent an incumbent LEC from choosing for its comparisons the highest approved rates for both loop and non-loop UNEs.[150]

56. We are not persuaded by AT&T's arguments that Pacific Bell should not be allowed to benchmark to Texas rates.[151] AT&T fails to present sufficient evidence that Texas does not meet the criteria set forth for determining whether a comparison to a particular state is reasonable. First. we disagree with AT&T's argument that Texas rates are an inappropriate benchmark because the Texas Commission recently opened a new rate proceeding.[152] The Commission has held that the existence of an ongoing state rate case does not prove that current rates are not TELRIC-compliant.[153] In the ***Verizon Massachusetts Order,*** the Commission found that it was reasonable for Verizon to rely on New York's current switching rates despite the fact that the New York rates were being reviewed at the time that Verizon relied on them for a benchmark.[154] The Commission found that the New York rates were found to be TELRIC-compliant by the New **York** Commission in an extensive rate-making proceeding,[155] and by this Commission in the *Bell Atlantic* ***New York Order,***[156] and were in effect at the time of the Verizon application in Massachusetts. The Commission stated that it would be unreasonable to preclude incumbent LECs from relying on appropriate rates that have been found to be TELRIC-compliant merely because these rates are under some form of challenge or review where there has not been a determination that those rates are not TELRIC-compliant.[157] As the D.C. Circuit stated:

---

149 ***See. e.g.***, ***Verizon Rhode Island Order,*** 17 FCC Rcd at 3320, para. 40; ***Verizon Pennsylvania Order,*** 16 FCC Rcd at 17457, para. 67; ***Vernon Massuchuserrs Order,*** **16** FCC Rcd at 9000-02, paras. 23-27. Loop rates consist of charges for the local loop, and non-loop rates consist of charges for switching, signaling, and transport.

150 ***Veriron Pennsylvania Order,*** 16 FCC Rcd at 17458, para. *66;* ***SWBT Arkansas/Missouri Order,*** 16 FCC Rcd **at** 20748, para. 58.

151 AT&T Comments **at** 19-26

152 *Id*. at 20-21

153 ***Verizon Massuchuserrs Order,*** I6 FCC Rcd at 9003, para. 31.

154 *Id.*

155 *See Application by Bell* ***Atlantic New York for Authorization Under Section*** *271* ***of the*** *Communicarions* ***Act Tu Provide In-Region, InterLATA*** *Service in the State of New* ***York,*** CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953 at 4081-83, 4084, paras. 238-40, 242 (1999) ***(Bell*** *Atlantic* ***New York Order).***

156 *Id* at 4083, para. 242

157 ***Verizon Massuchuserrs Order,*** I6 FCC Rcd at 9002, para. 29.

> [W]e suspect that rates may often need adjustment to reflect newly discovered information, like that about Bell Atlantic's future discounts. If new information automatically required rejection of section 271 applications, we cannot imagine how such applications could ever be approved in this context of rapid regulatory and technological change.'"

57. Our reasoning in the *Verizon **Massuchuserrs Order*** was recently upheld by the D.C. Circuit, which held that "it is reasonable for the FCC to rely on the states' periodic rate revision process as a means of correcting flaws in adopted rates."[159] The court also noted that the time it takes for state commissions to modify rates based on changed cost data "does not render a rate invalid. Indeed, when element costs are falling, such temporary deviations, or regulatory lags, are both unavoidable and perhaps even desirable. . . . [R]ate determinations consume substantial periods of time and cannot be constantly undertaken."[160] The court further held that it will reverse the Commission'sjudgment only if it sufficiently disregarded the rate's age "so as to adopt rates that were unreasonably outdated."[161]

58. We note that the Texas Commission is actively investigating UNE rates and may modify those rates to reflect changed market conditions, technologies, and information. **If** the Texas Commission adopts modified UNE rates, future section 271 applicants could no longer demonstrate TELRIC compliance by showing that their rates in the applicant states are equivalent to or based on the current Texas rates, which will have been superceded.'" Moreover, because Pacific Bell would have us rely on rates from Texas, a decision by the Texas Commission to modify these UNE rates may undermine Pacific Bell's reliance on those rates in California and its compliance with the requirements of section 271, depending on the Texas Commission's

59. Second, **we** disagree with AT&T's assertion that the Texas rates are based on outdated cost data and are therefore inappropriate for benchmarking purposes.[164] When the Commission approved SWBT's section 271 application in 2000, it found that the Texas rates

---

158 *AT&T Corp. v. FCC*, 202 F.3d at 617-18

159 *WorldCom, 308* F.3d at *9*

160 *Id.* at *8*

161 *Id.*

162 *Verizon Massachusetts Order.* 16 FCC Rcd at *9002,* para. 29. *See also WorldCom **Inc. v.** VerizonNew England Inc., Bell Atlantic Communicarions, Inc. (d/b/a/ Verizon Long **Disrance). NYNEX Long Disrance** Company (d/b/a Verizon Enterprises **Solutions),** and Verizon Global Networks, Inc.*, **EB** 02-MD-017, **Memorandum** Opinion and Order, 17 FCC Rcd **15115** *(2002).*

163 *See Verizon Massachusetts Order,* 16 FCC Rcd at 9002-03, para. 30.

164 AT&T Comments at *20-21;* AT&T Reply Comments at 13

comply with TELRIC principles and fall within a reasonable range of what TELRIC principles would produce.[165] The fact that the Texas Commission is currently reexamining certain UNEs does not mean the rates are no longer TELRIC-compliant, nor does it mean that Texas rates cannot he used as an appropriate benchmark.[166] No commenter provides sufficient evidence for us to conclude that these rates are unreasonably outdated. We disagree with AT&T's assertion that in *WorldCom,* the D.C. Circuit held that a "safe harbor" exists for use of benchmarked rates that are three *to* four years old, but that Texas rates fall outside this "safe harbor," are "ancient," and thus violate TELRIC.[167] The court in *WorldCom* did not define a standard for a "safe harbor" of rate ages, nor did it state that Commission reliance on older rates is unreasonable. The court did find that rates may become "ancient" in "a market with falling costs," or "have been based on fraudulent ILEC submissions," or a "challenger. . . tender[s] evidence of . . . unreasonableness [with regard to the rates] so strong as to preclude FCC approval without a hearing."[168] We find that AT&T has not met its burden in providing sufficient evidence that the Texas rates are "ancient." We are not convinced that Texas rates are "ancient" merely because they are based on data that is more than three or four years old.[169] In opening its docket to examine UNE rates, the Texas Commission did not change its conclusion that current rates are TELRIC-compliant. Rather, it noted that some loop costs may have changed over time, and held that loop cost data should he examined in an upcoming rate case.[170] The state commission noted that it was unclear whether loop rates would move up or down after an evaluation of new cost data."[171] Additionally,

---

[165] *SWBT Texas Order,* 15 FCC Rcd at 18392, para. 82.

[166] We disagree with AT&T's assertion that an analysis of cost data reported through ARMIS, as well as data used in our USF cost model, proves that Texas rates are based on outdated cost data and thus violate TELRIC. AT&T Comments at 24 and Tab A, Declaration of Michael R. Lieberman and Brian F. Pitkin (AT&T Lieberman-Pitkin Decl.) at paras. 10-13; AT&T November 26 Shenk *Ex Parte* Letter at Exh. 1, Supplemental Joint Declaration of Michael R. Lieberman and Brian F. Pitkin (AT&T November 26 Lieberman/Pitkin Decl.) at paras. 14-26. The Commission has stated that our USF cost model is used to compare relative cost differences between states, not to set rates. Sei. *Verizon Massuchuserrs Order,* 16 FCC Rcd at 9003, para. 32; *SWBT Kansas/Oklahoma Order,* 16 FCC Rcd at 6277, para. 84. The fact that cost data used in our USF cost model may have declined does not mean that current rates violate TELRIC. Additionally, ARMIS data is based on embedded costs, not the forward-looking costs required to set TELRIC-compliant rates. As discussed above, we "rely on the states' periodic rate revision process as a means of correcting flaws in adopted rates." *WorldCom*, 308 F.3d at 9.

[167] AT&T November 26 Lieberman/Pitkin Decl. at paras. 9-12

[168] *WorldCom*, 308 F.3d at 7

[169] AT&T also fails to present evidence that Texas rates are based on fraudulent submissions, or are otherwise unreasonable.

[170] *See* Letter from Colin S. Stretch. Counsel for Pacific Bell, to Marlene H. Dortch, Secretary. Federal Communications Commission, WC Docket No. 02-306 (tiled Dec. 17,2002) (Pacific Bell Dec. 17 *Ex Parte* Letter), Attach. A, Petition of MCIMetro Access Transmission Services, LLC, Sage Telecom, Inc., Texas UNE Platform Coalition, McLeod USA Telecommunications Services, Inc., and AT&T Communications of Texas, LP for Arbitration with Southwestern Bell Telephone Company under the Telecommunications Act of 1996, Arbitration Award. Texas Commission Docket No. 24542 at 95-97 (2002).

[171] *Id.*

the Texas rates are neither interim nor subject to true-up, both of which provide us with further assurance that the Texas Commission finds the rates to be TELRIC-compliant. In regard to the issue of "old rates," the court specifically stated that, even where the Commission made no explicit findings with regard to the rates at issue, "it adopted what is likely a far more workable approach to the problem of timeliness – namely, reliance on the state's own processes of rate revision and correction."[172] The fact that the Texas commission is reexamining the rates does not make them less TELRIC-compliant, and our reliance on the Texas commission's reexamination process is exactly the type of approach that the D.C. Circuit approved in *WorldCom*, that is, reliance on the state commission's "processes of rate revision and correction."[173]

60. Third, we disagree with AT&T's assertion that Texas is an inappropriate benchmark because substantial differences exist in rate structure, BOCs, geography and company structure between California and Texas.[174] In the *SWBT Kansas/Oklahoma Order*, the Commission determined that an applicant state may benchmark to an anchor state if the states have a common BOC and geographic similarities, similar rate structures, and the rates in the anchor state had been found by the Commission to be TELRIC-compliant.[175] The Commission has since refined this analysis. The Commission determined in the *Verizon Pennsylvania Order* that the most important part of an appropriate benchmark analysis is whether the Commission had found TELNC-compliant rates in the anchor state.[176] The Commission clarified that, "while a comparison state's rates must have been found reasonable. the remaining criteria previously set forth should be treated as indicia of the reasonableness of the comparison" because "it is clear that the most relevant factor of the four-part test is TELRlC compliance. . . . The other criteria do not rise to such a level."[177]

61. Here, we find that AT&T fails to prove that differences between California and Texas in geography, BOCs, and rate structures, such as the difference in call-set up and duration measurements, invalidate our benchmark analysis. The USF cost model is designed to account for relative cost differences between states based on, among other things, geographic differences.[178] For example, AT&T states that whereas Pacific Bell recovers the cost of vertical features through 31 different rate elements, Pacific Bell recovers the cost of vertical features through the recurring switching rate element.[179] This difference in rate structure, AT&T argues,

---

172 ***WorldCom,*** 308 F.3d **at** 8.

173 ***Id.* at 8**

174 AT&T Comments **at** 23-28.

175 *SWBT Kansas/Oklahoma Order,* 16 FCC Rcd **at** 6276, **para.** 82.

176 *Verizon Pennsylvania* ***Order,*** 16 FCC Rcd **at** 17457, **para.** 64.

177 *Id.*

178 **See** http:/lw.fcc.gov/wcb/tapd/hcpmiwelcome.htrnl

179 AT&T Lieberman-Pitkin Decl. **at para.** 19.

renders comparison of the non-loop rate in California and Texas quite complex, because it necessitates conversion of the 31 California vertical features charges into an average rate, which requires estimation of penetration rates for the vertical features in California.[180] Our benchmark analysis takes the California vertical feature charges into account by including three features, which is the average number of features per access line for both retail and wholesale usage. We take additional comfort in the fact that even if the benchmark analysis was conducted with an assumption of ten features, the maximum offered by AT&T in California, Pacific Bell's rates would pass a benchmark analysis.[181] Our benchmark analysis takes other rate structure differences into account by converting element-specific rates into weighted averages based on state-specific actual usage figures.[182] The use of these weighted averages ensures a more accurate rate comparison between states with differing rate structures.

62. Additionally, the Commission has previously utilized a benchmark analysis between two states that were not originally part of the same BOC.[183] In the ***Verizon Pennsylvania Order***, the Commission noted that New **York** and Pennsylvania, although both part of Verizon's service territory, were not part of the same original BOC. The Commission concluded, however, that a benchmark comparison was still appropriate because our cost model makes no distinction between data among BOCs, and no reason existed to suspect that such a comparison has been made less significant because different BOCs served the two states.[184] The same reasoning applies here. Although Texas and California were not part of the same original BOC, we find that a benchmark comparison between the two states is appropriate because our cost model makes no distinction between data among BOCs, and we have no reason to suspect that such a comparison is less significant because different BOCs serve Texas and California.

63. Having determined that a benchmark to Texas is appropriate, we conduct our own benchmark analysis by comparing: (1) the percentage difference between its California and Texas rates for the UNE-platform on a per-line per-month basis for non-loop rate elements collectively. and (2) the percentage difference between California and Texas costs per line and per month for these non-loop elements collectively, based on the Synthesis Model.[185] For purposes of this comparison, UNE-platform non-loop rate elements are line port, end office

---

180 ***Id.***

181 ***Id.*** at n.21

182 ***See, e.g., Verizon Pennsylvania Order,*** 16 **FCC** Rcd at 17458, n.250; ***SWBT Arkansas/Missouri Order,*** **16** FCC Rcd at 20747-48, para. 59 and n. 161

183 See ***Verizon Pennsylvania Order,*** 16 **FCC** Rcd at 17457, para. 64.

184 ***Id.***

185 We adjust the costs derived from the Synthesis Model to make them comparable to UNE-platform costs. *See* ***Verizon Pennsylvania Order,*** 16 FCC Rcd at 17458, para. 65 n.249. We benchmark non-loop rates separately from loop rates. See, *e.g.*, ***id.*** at 17458, para. 66; ***Verizon Massachusetts Order,*** 16 FCC Rcd at 9000-02, paras. 23-21.

switch usage, common transport (including the tandem switch), and signaling, including vertical features.[186]

64. Here, we find that Texas' rates have been found to be TELRIC-compliant,[187] and Pacific Bell may benchmark its California rates to Texas rates. We conclude that California's recurring UNE rates fall within the range that TELRIC-based ratemaking would produce. With respect to loops, in taking a weighted average in California and Texas, we determine that California's rates are lower than those in Texas. The weighted average rates for a 2-wire analog loop in California and Texas are $9.93 and $14.10, respectively. The California loop rate is thirty percent lower than the Texas loop rate. The USF cost model, however, shows that California loop costs are fourteen percent lower than the Texas loop costs.[188] Because the percentage difference between California loop rates and Texas loop rates exceeds the percentage difference between California loop costs and Texas loop costs, Pacific Bell's recurring loop rates satisfy our benchmark test."[189]

65. We also conclude that non-loop rates fall within a reasonable TELRIC range."[190] The non-loop rate includes three representative vertical features, as discussed above.[191] Taking the relevant rate elements into account, the California non-loop rates *are* 34 percent lower than the non-loop rates for Texas, while California's non-loop costs are two percent lower than Texas' non-loop costs, according to the USF cost model. Because the percentage difference between California non-loop rates and Texas non-loop rates exceeds the percentage difference between California non-loop costs and Texas non-loop costs, Pacific has met its burden regarding the benchmark test using our USF cost model for recurring non-loop rates.

---

186 ***See Joinr Application by BellSouth Corporation, BellSourh Telecommunicarions. Inc., and BellSourh Long Distance, Inc./or Provision of In-Region. InterLATA Services in Alabama, Kentucky, Mississippi. Norrh Carolina. and South Carolina,*** Memorandum Opinion and Order, WC Docket No. 02-150, FCC 02-260 (rel. Sept. 18,2002) ***(BellSouth Multistate Order)*** at n.319.

187 *SWBT* ***Texas Order,*** 15 FCC Rcd at 18392, para. 82

188 ***See*** http://www.fcc.gov/wcb/tapd/hcpm/welcome.html.

189 ***See, e g.*** *SWBT* ***Arkansas/Missouri Order,*** I6 FCC Rcd at 20748, para. 57 and n.160

190 This analysis is based on Pacific Bell's conclusions regarding feature utilization in California. Pacific Bell Makarewicr Aff. at n.17. The three features are call waiting, caller ID and 3-way calling. *Id.* Pacific Bell notes that it researched competitive offerings in California and found that very few feature packages offered more than five features, and found that the average number of features offered was three. ***Id.*** at n.21. Pacific Bell notes that in filings before the California Commission, AT&T assumed utilization of three features when it conducted a price-squeeze analysis that was presented to the California Commission. *Id.* at n.21. Because no party raises an issue relating to the use of our benchmark analysis for non-loop elements in the aggregate, we do not address the issue. *See Application by* ***Verizon Virginia Inc.,*** ***Veri-on*** *Long* ***Distance Virginia, Inc.,*** ***Verizon*** *Enrerprise* ***Solutions Virginia Inc., Verizon Global Networks Inc., and Verizon Select*** *Services of* ***Virginia Inc., for Authorization to Provide In-Region, InterLATA Services in Virginia,*** WC Docket No. 02-2 14, Memorandum Opinion and Order, FCC 02-297 (2002) at paras. 109-10 ***(Verizon Virginia Order).***

191 ***See*** our discussion ***supra*** at Section IV.A. 1.(b)(ii).

(vi) Nonrecurring Charges

66. We disagree with AT&T's assertion that Pacific Bell's nonrecurring charges violate TELRIC principles and cause Pacific Bell to fail this checklist item. In adopting nonrecurring costs for Pacific Bell in 1998, the California Commission examined charges by AT&T that Pacific Bell violated TELRIC principles by recovering recurring costs in its nonrecurring charges. AT&T specifically alleged in that proceeding that Pacific Bell's field work and head count loading nonrecurring charges"' improperly included recurring costs. The California Commission determined that AT&T overstated the magnitude of the double-counting problem and that Pacific Bell properly recovered field work nonrecurring costs.[193] The California Commission stated, however, that Pacific Bell appeared to be double-recovering some costs in its head count loadings. Noting that the Commission's rules prohibiting the incumbent LECs from recovering recurring costs through nonrecurring rates[194] were the subject of a pending stay order by the Eighth Circuit,[195] the California Commission stated that it would "direct Pacific . . . to remove head count loadings from . . . [its] nonrecurring cost studies" if the Court reversed the stay.[196] In June of 1999, the California Commission affirmed its decision that the costs of Pacific Bell's field work activities were properly recovered in its nonrecurring charges."' In November of 1999, the California Commission found that Pacific Bell's nonrecurring charges conform to TELRIC principles and that Pacific Bell's nonrecurring charges were not being double-counted, i.e., counted as recurring costs as well as nonrecurring costs.[198]

67. Our rules require that recurring costs be recovered through recurring charges, unless an incumbent LEC proves to the relevant state commission that such recurring costs are *de*

---

192 **AT&T Comments at 28-29.** ***See*** *Second OANAD Cost Decision* **at 49 (stating that** field **work activities include provisioning a loop);** *id.* **at 50, n.34 (stating that "[o]ne example** of **a head-count loading would** be **support costs that would be necessary to have a service order representative process orders. Computers,** ***software*** **and electricity are examples.").**

193 *SecondOANAD Cost Decision* **at** 51**-53**

194 *See Local Competition Order,* **11 FCC Rcd at 15875, para. 746.**

195 *See Iowa Utilities Boardv FCC,* 120 **F.3d** *753* **(8th Cir.** 1997).

196 *Second OANAD* **Cosr** *Decision* **at** 53.

197 *Second OANAD* **Cost** *Decision Modification* **at** 25-27.

198 ***OANAD*** *Pricing Decision* **at** 71, n.71

minimis."" Our rules also permit states to require LECs in an arbitrated agreement to recover nonrecurring costs through recurring charges over a reasonable period of time.'"

68. AT&T contends that although the California Commission stated that it would direct Pacific Bell to remove the head count loadings from its nonrecurring charges in the event that the Supreme Court reversed the Eighth Circuit's stay, the California Commission has failed to do so despite the Supreme Court's reversal of the stay order in January, 1999.[201]

69. Pacific Bell responds that, contrary to AT&T's claim, the California Commission did not find that Pacific Bell recovered recurring costs in its nonrecurring charges in violation of the Commission's TELRIC principles. Rather, Pacific Bell asserts that the California Commission determined that the type of costs of apparent concern to AT&T in this proceeding should be included in Pacific Bell's nonrecurring costs."' Pacific Bell contends that by setting nonrecurring rates on the basis of Pacific's nonrecurring costs studies after the Supreme Court's decision, "the California Commission implicitly (and appropriately) rejected AT&T's argument that the costs associated with secondary investments must be removed from the nonrecurring UNE costs.""'' Also, Pacific Bell contends that secondary investment items are "clearly" nonrecurring costs properly recovered through nomecurring charges consistent with TELRIC pricing principles, given that these costs are associated with the installation of a UNE at the time of installation.[204] Pacific Bell further claims that "even a cursory examination" of the nonrecurring charges associated with the UNE-P in California reveals that the rates in place are well within the range that a reasonable application of TELRlC would produce.'"

---

[199] 47 C.F.R. § 51.507(d). Recurring costs are considered ***de minimis*** under the Commission's rules when the costs of administering the recurring charge would be excessive in relation to the amount of the recurring costs. *Id.*

[200] *Local Competition Order,* 11 FCC Rcd at 15875, para. 749. In such circumstances, however, we require the state commission "to take steps to ensure that incumbent LECs do not recover nonrecurring costs twice and that nonrecurring charges are imposed equitably among entrants." *Id.* at 15876, para. 750. We further require that state commissions ensure that nonrecurring charges imposed by incumbent LECs "are equitably allocated among entrants where such charges are imposed on one entrant for the use of an asset and another entrant uses the asset after the first entrant abandons the asset." *Id.* at 15876, para. 751

[201] AT&T Comments at 28-29; AT&T Reply at 12; ***see also AT&T v. Iowa***

[202] Pacific Bell Reply at 22-23; Pacific Bell Application Reply Tab. 13, Affidavit of Richard L. Scholl (Pacific Bell Scholl Reply Aff.) at paras. 3-6 (stating that AT&T's present claim appears to center on the alleged wrongful inclusion of the type of costs associated with secondary investments, such as installation trucks and administrative space occupied by installation technicians).

[203] Pacific Bell Application Reply at 23 (citing *OANAD* ***Pricing Decision*** at ordering para. 2 ("The non-recurring charges associated with the UNEs offered by Pacific . . . satisfy the requirements of Sections 251(c)(2), 251(c)(3), and 252(d)(1) . . . and are hereby adopted.")).

[204] ***Id.*** at 23-24; ***see*** *also* Pacific Bell Scholl Reply Aff. at para. 14 ("[t]he costs at issue are the costs ***of*** the one-time event of using a capitalized item (*e.g.*, a truck) while installing a UNE, not costs of ongoing events.").

[205] ***Id.*** at 24. n.21

70. The record reflects that following the Supreme Court's decision, the California Commission did not specifically address whether Pacific Bell's head count loading costs should be recovered from its nonrecurring or recurring charges,[206] but did specifically find that Pacific Bell's nonrecurring charges conform to TELRIC principles and that Pacific Bell's nonrecurring costs were not being double-counted, i.e., recovered in both recurring and nonrecurring charges."[207]

71. Even assuming that AT&T is correct in its assertion that these costs are being recovered improperly in nonrecurring charges, we have reviewed Pacific Bell's nonrecurring charges and find that they are within the reasonable range that application of TELRIC principles would produce.[208] As discussed above, different states may reach different results that are each within the range of what a reasonable application of TELRIC would produce. Therefore, an input rejected elsewhere might be reasonable under the specific circumstances here. We do not conduct a ***de novo*** review of a state's pricing determinations.[209] We will, however, reject an application if "basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce."[210] AT&T fails to cite any specific nonrecurring rate offered by Pacific Bell that falls outside a reasonable TELRIC range. We observe that the nonrecurring charge for Pacific Bell's "hot cut"[211] for a single line is $73.04 in California and $1 03.37 in Texas."[212] On a per-line basis, the nonrecurring hot cut charge for an eight-line order is $24.76 in California and $29.08 in Texas."[213] We also observe that other

---

206 *See OANAD Pricing Decision.* In June of 1999, the California Commission affirmed that the costs of Pacific Bell's field work activities were properly recovered in its nonrecurring charges. ***Second OANAD Cost Decision Modification*** at 25-27

207 ***OANAD Pricing Decision*** at 71, n.71

208 Based on the record before us, AT&T does not appear to have raised this issue again before the California Commission in the nearly three years since its decision. We are troubled by AT&T's decision to remain silent before the California Commission on this issue, only to raise it here now.

209 ***Verizon New Jersey Order,*** 17 FCC Rcd at 12285, para. 17; ***Verizon Pennsylvania Order,*** 16 FCC Rcd at 17453, para. 55; see ***also Sprint v.*** FCC, 274 F.3d at 556.

210 ***Verizon New Jersey Order,*** 17 FCC Rcd at 12285, para. 17; ***Verizon Pennsylvania Order,*** 16 FCC Rcd at 17453, para. 55.

211 A hot cut is the process of convening a customer from one network, usually a UNE-platform served by an incumbent LEC's switch. to a UNE-loop served by another carrier's switch. The "cut" is said to be "hot" because telephone service on the specific customer's loop is interrupted for a brief period of time. ***See generally Verizon New Jersey Order,*** 17 FCC Rcd at 12302, para. 61. The rate for this UNE has been the most contentious nonrecurring charge in recent 271 applications. See, *e.g., id. at 12302-05, paras.* **61-68;** *see also Verizon New Hampshire/Delaware* ***Order*** at para. 88; SWBT ***Texas Order,*** 15 FCC Rcd at 18494, paras. 275-77.

212 Pacific Bell Nov. 13 *Ex Parte* Letter at 6

213 *Id.*

nonrecurring charges in California are similarly comparable to charges for similar activities in Texas."[214] We therefore find that AT&T has not shown that Pacific Bell's nonrecurring charges fall outside the range that a reasonable application of our TELRIC rules would produce and that AT&T's allegations do not cause Pacific Bell to fail this checklist item.

2. Access to Operations Support Systems

72. Under checklist item 2 of section 271, a BOC must provide nondiscriminatory access to its OSS – the systems, databases, and personnel that the BOC uses to provide service to customers."[215] We find, as did the California Commission,[216] that Pacific Bell provides competitors in California nondiscriminatory access to its OSS. Consistent with past practice, we consider the entire record, including commercial practice as well as third-party testing, and focus our review on specific issues in controversy or areas where Pacific Bell fails to satisfy performance standards. We do not address each OSS element in detail where our review satisfies us that Pacific Bell complies with the nondiscrimination requirements of the checklist item. Specifically, *our* discussion focuses on the sufficiency of independent third-party testing, Pacific Bell's pre-ordering, ordering, provisioning, maintenance and repair functionalities, wholesale billing practices, change management processes, and access to UNE combinations. Our review of the record, including areas of Pacific Bell's OSS performance contained in Appendix B that we do not specifically discuss, satisfies us that Pacific Bell is providing competitors nondiscriminatory access to OSS in compliance with checklist item 2.

a. Independent Third-party Testing

73. As the Commission has held in prior section 271 proceedings, the persuasiveness of a third-party review depends upon the conditions and scope of the review.[217] To the extent a test is limited in scope and depth. we rely on other evidence, such as actual commercial usage, to assess whether the BOC provides nondiscriminatory access to its OSS.[218] Based on our review of the evidence in the record describing the test process, and the evaluation that the California Commission offered, we find that the third-party test was broad and objective and provides meaningful evidence that is relevant to our analysis of Pacific Bell's OSS. The third-party test results support our finding that Pacific Bell provides nondiscriminatory access to its OSS.

---

214 Pacific Bell Vandeloop Aff. at Attach. B

215 *Bell Atlantic New York Order,* 15 FCC Rcd at 3989-90, para. 83

216 *California Commission Order* at 305-07.

217 *Ameritech Michigan Order.* 12 *FCC* Rcd at 20659, para. 216.

218 See *Joint Application by BellSouth Corporation, BellSouth Telecommunicaiions, Inc., and Bellsouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana,* CC Docket No. 02-35, FCC 02-142, Memorandum Opinion and Order, 17 FCC Rcd 9018,9070-71, para. 105 (2002) (*BellSouth Georgia/Louisiana Order).*

74. The California Commission directed Pacific Bell to develop a Master Test Plan (MTP) and submit it for review and comment."[219] Following comments from the California Commission's staff and interested parties, as well as a two-week industry-wide collaborative workshop, the California Commission issued a finalized MTP in August 1999, setting up the test requirements and the need to have outside consultants assist in the test of Pacific Bell's systems.'"[220] The California Commission issued Requests for Proposals for teams to perform the three significant roles of the OSS test: the Test Administrator (TAM), the Technical Advisor (TA) and the Test Generator (TG).[221] The California Commission selected Cap Gemini Ernst & Young (Cap Gemini) to be the TAM and TA, and selected Global exchange Services (Global exchange) Io be the TG.[222] As the TAM, Cap Gemini administered the actual test effort by defining the test execution and monitoring the TG.[223] As the TG, Global exchange set up four "pseudo competitive LECs," and interacted with Pacific Bell by submitting the orders on behalf of those pseudo companies on a day-to-day basis.[224] Global exchange submitted and processed orders using manual procedures (by fax), graphical user interface (GUI) and application-to-application electronic data interchange (EDI).[225] Cap Gemini's Final Report assessed the results of functionality testing, capacity testing, and performance measurement analysis.[226] This testing and evaluation examined the five critical OSS functions: pre-ordering, ordering, provisioning, maintenance and repair, and billing.[227]

75. The functionality test assessed Pacific Bell's readiness and capability to provide the competitive LECs with access to Pacific Bell's OSS in order to perform pre-ordering, ordering, provisioning, and maintenance and repair activities to customer accounts.[228] To reflect the variety of customer orders that competitive LECs could place, Local Service Requests (LSRs) were generated for both resale and UNE services, as well as for business and residential accounts.[229] The capacity test assessed whether Pacific Bell's systems had sufficient capacity to

---

219 *California Commission Order* at 37.

220 *California Commission Order* at 37.

221 *California Commission Order* at 37.

222 *California Commission Order* at 37; Pacific Bell Application App. A , Vol. 3, Affidavit of Stephen D. Huston and Beth Lawson (Pacific Bell Huston/Lawson Aff.) at para. 31.

223 Pacific Bell Huston/Lawson Aff. at para. 31; Cap Gemini Ernst & Young, Final Repon of the Pacific Bell Operational Support Systems, Version 1.2 at 26 (Feb. 12, 2001) (TAM Final Repon) App. D, Tab 212.

224 Pacific Bell Huston/Lawson Aff. at para. 31; TAM Final Report at 27

225 TAM Final Repon at 27

226 Pacific Bell Huston/Lawson Aff. at para. 37; TAM Final Report at 22.

227 Pacific Bell Huston/Lawson Aff. at para. 37; TAM Final Report at 22.

228 TAM Final Repon at 28.

229 TAM Final Repon at 28.

handle the workload volumes required to support competitive LEC pre-order and ordering activities.[230] The capacity test consisted of a pre-order test, an order test, and a combined pre-order/order volume stress test.'" Cap Gemini, as the **TAM,** formed a statistical team to track and maintain performance measurement statistics based on the test effort, and concluded that the pseudo competitive LECs generally received parity service levels from Pacific Bell and even surpassed the benchmark standards for most services for most months.[232] In addition to the Cap Gemini analysis, Pacific Bell agreed to a third party audit of its performance measurement systems and processes, which was performed by PricewaterhouseCoopers (PWC).[233]

76. In performing the third-party tests, Cap Gemini, Global exchange, and the California Commission took precautions to maintain blindness and independence of the testing process."' To preserve blindness of the test, four pseudo competitive LECs were created; each had a separate Access Customer Name Abbreviation (ACNA), Operating Company Number (OCN), Billing Account Number (BAN), and produced different test orders with a variety of products and services."' Moreover, Pacific Bell was unaware of the mix or the timing of test scenarios submitted over its interfaces.[236] To ensure independence of the test, the California Commission staff monitored the contact between Cap Gemini and Pacific Bell.[237] In addition, Cap Gemini and Global exchange's activities were directed solely by the California Commission, and the results of the tests were provided solely to the California Commission.[238]

77. We note that only one party, AT&T, challenges the accuracy of Pacific Bell's performance data and the effectiveness of the third-party test. With regard to the accuracy of the performance data, AT&T argues that, in addition to Cap Gemini's restricted ability to perform a full assessment of the performance data, the audit PWC conducted was inadequate and the data reconciliations with competitive LECs were too limited to demonstrate the accuracy of the performance data.[239] We reject AT&T's claims. While we recognize the limitations expressed

---

230 Pacific Bell Huston/Lawson Aff. at para. 37; T A M Final Report at 31

231 T A M Final Report at 31

232 T A M Final Report at 54-35

233 *See* Pacific Bell Application App. **A,** Volume 4a, Affidavit of Gwen S. Johnson (Pacific Bell Johnson Aff.) at para. 201

234 Pacific Bell HustodLawson Aff. **at** para. 44

235 Pacific Bell Huston/Lawson Aff. at para. 44; T A M Final Report at 27

2ib Pacific Bell HustodLawson Aff. at para. 45

237 Pacific Bell Huston/Lawson Aff. at para. 46; T A M Final Report at 25

2iR Pacific Bell Huston/Lawson Aff. at para. 46

2i9 AT&T Comments. Tab E. Declaration of Diane P. Toomey, Susan M. Walker, and Michael Kalb (AT&T Toomey/Walker/Kalb Decl.) at paras. 27-46; Letter from Richard E. Young, Counsel for AT&T, to Marlene H. (continued....)

by Cap Gemini with regard to the performance data available during the third party test,"[239] we conclude that Pacific Bell has sufficiently demonstrated that its performance data is accurate. As the California Commission mentioned in its order, the competitive LECs were involved in both the design of the performance data audit and choosing PWC as the auditor.[241] PWC determined that Pacific Bell's systems and processes in compiling the data for the performance measurements were substantially in compliance with the business rules agreed upon by Pacific Bell and the competitive LECs.[242] For the systems and processes that were not fully in compliance, Pacific Bell implemented improved processes and PWC issued two subsequent reports detailing the modified processes."[243] The data reconciliations between Pacific Bell and competitive LECs also provide probative evidence that Pacific Bell's data collection procedures are reasonably accurate.[244] We also note that AT&T has provided no evidence of specific inaccuracies with the performance data, or any evidence that suggests that the data Pacific Bell presents cannot be relied upon. We do recognize, however, that other competitive LECs did provide evidence of inaccuracies with regard to certain billing performance measurements, which we address below in the billing section.

78. AT&T also argues that the third-party test was deficient in establishing the operational readiness of the EDI ordering interface because it failed adequately to test the ability of the OSS to handle UNE-P orders through any version of EDI.[245] While we recognize that the functionality portion of the third-party test did not include testing of UNE-P solely over the EDI interface, we agree with the California Commission that the GUI portion of the functionality phase, combined with the EDI UNE-P portion in the capacity phase, offer a reasonable indication of how Pacific Bell's systems will be able to handle UNE-P orders submitted via the EDI OSS interface.[246] Although the vast majority of the UNE-P orders were submitted over Pacific Bell's

(Continued from previous page)
Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-306 (filed Nov. 27,2002) (AT&T Nov. 27 Young *Ex Parte* Lener), Anach. 1, Joint Supplemental Declaration of Diane P. Toomeyand Sarah DeYoung (AT&T Toomey/DeYoung Supp. Decl.) at paras. 22-35.

[240] In reviewing the statistical analysis of Pacific Bell's performance data, Cap Gemini noted that the analysis was "somewhat limited because it was unable to assess a large amount of competitive LEC and pseudo competitive LEC performance data due to incomplete Pacific Bell data necessary for comparative analysis. TAM Final Report at 34-35.

[241] *California Commission Order* at 94; *see also* Pacific Bell Johnson Aff. at para. 201 (noting how competitive LECs were involved in a collaborative effort to establish and select an auditor).

[242] Pacific Bell Johnson Aff. at para. 205; Pacific Bell Johnson Aff., Attach. D, Independent Accountant's Repon on Management's Assertions Related to Pacific Bell's Compliance with Certain Requirements of the Joint Partial Settlement Agreement (PWC Report) at 8.

[243] Pacific Bell Johnson Aff., Attach. E, Report of Independent Accountants (PWC Supp. Report) at 1-53; Pacific Bell Johnson Aff., Anach. F, Repon of Independent Accountants (PWC 2nd Supp. Report) at 1-5.

[244] *See* Pacific Bell Johnson Aff. at paras. 210-18

[245] AT&T Comments at 43-44

[246] *See California Commission Order* at 80-81; Pacific Bell Huston/Lawson Aff. at para. 65

GUI LEX interface during the functionality testing phase, both LEX and EDI flow into the same ordering and provisioning process, regardless of which interface is used to initiate the test.[247] Accordingly, testing UNE-P over LEX does provide useful evidence regarding the ability of Pacific Bell's systems to process UNE-P orders generally. Moreover, in the EDI capacity test, Global exchange processed UNE-P orders (as well as other types of UNE orders) through the EDI interface to test whether Pacific Bell's OSS would be able to process a large number of orders using EDI.[248] Therefore. the capacity test also indicated that Pacific Bell's OSS was operationally ready to process UNE-P orders via EDI.

79. We also dismiss AT&T's assertions that the third-party test failed to show operational readiness of the OSS because it did not include testing of the LSOG 5 version of the EDI interface.[249] As AT&T itself notes, Pacific Bell did not implement LSOG 5 until April 2002, more than a year after the completion of the third-party test.[250] As we have stated previously, "OSS functionalities are constantly evolving, and BOCs should not be penalized because substantially improved functionalities come on-line near the conclusion of the testing period or after testing has already concluded."[251]

80. In any event, we find that the commercial data demonstrates that Pacific Bell's EDI interface is able to effectively process competing carriers' UNE-P service orders.[252] Pacific Bell processed 73,150 UNE-P service orders over its EDI interface in July 2002, 92,120 UNE-P service orders in August 2002, and 119,940 UNE-P service orders in September 2002.[253] In relying on this commercial data, we reject AT&T's arguments that the commercial data is not probative because the service orders were submitted over the LSOR 3.06 version of the EDI software, rather than LSOG 5 version to which competitive LECs are in the process of converting.[254] Because, as we noted above, OSS functionalities are constantly evolving, as long as the BOC has demonstrated operational readiness based on a current software version, we do

---

247 *California Commission Order* at 80-81; Pacific Bell HustodLawson Aff. at para. *65.*

248 TAM Final Report at 142-43. In the volume test, Global exchange submitted 445 UNE-P conversion orders and 23 UNE-P new orders using EDI, and in the stress test, submitted 1,320 UNE-P conversion orders and 30 new orders using the EDI interface.

249 AT&T Comments at 44; AT&T Reply at 23

250 AT&T Comments App. Tab D, Declaration of Walter W. Willard (AT&T Willard Decl.) at para. 47.

251 *Veriion New Jersey Order,* 17 FCC Rcd at 12312, para. *86.*

252 See Letter from Colin S. Stretch, Counsel for Pacific Bell, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-306, Attach. 2 at 2 (filed Oct. 17, 2002) (Pacific Bell Oct. 17 *Ex Parte* Lerter).

253 Pacific Bell Oct. 17 *Ex Parte* Letter, Attach. 2 at 2.

254 AT&T Nov. 27 Young *Ex Parte* Letter, Attach. 2, Supplemental Declaration of Walter W. Willard (AT&T Williard Supp. Decl.) at paras. 60-61

not require the BOC *to* demonstrate that a software version that most competitive LECs have not yet converted to is operationally ready. Moreover, Pacific Bell has recently begun processing Competitive LEC UNE-P orders submitted via the LSOG 5 version of the EDI software and there is no evidence indicating that competitive LECs are experiencing any problems submitting orders with this new software version.[255] Finally, Pacific Bell provides evidence that competitive LECs are successfully submitting UNE-P service orders under the LSOG 5 version of the LEX interface, and as noted above, both LEX and EDI flow into the same ordering and provisioning process.[256]

b. Pre-Ordering

81. We find that Pacific Bell provides carriers in California nondiscriminatory access to all pre-ordering functions. Competing carriers have access to four principal electronic interfaces, including Enhanced Verigate, which is a GUI, as well as EDI, CORBA and Uniform Datagate, which are application-to-application interfaces.[257] Competing carriers are able to use any of the four interfaces to perform all of the key functions identified in **prior** section 271 orders.[258] No commenter raised any problems with Pacific Bell's pre-order systems, and performance data show that Pacific Bell typically meets every benchmark or retail analog, confirming that competitors have equivalent access to Pacific Bell's pre-order databases.[259]

82. We also conclude that Pacific Bell provides competitive LECs with the information necessary to integrate its pre-ordering and ordering systems. Specifically, Pacific Bell's four pre-ordering interfaces provide "parsed" customer service information pursuant to the guidelines of the ordering and billing forum (OBF)—that is, information divided into identifiable

---

255 Pacific Bell has provided evidence that, since October 2002, three competitive LECs have submitted over 500 orders using either LSOR version 5.01 or 5.02. ***See*** Letter from Geoffrey M. Klineberg, Counsel for Pacific Bell, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-306, Attach. at 1 (filed Dec. 6, 2002) (Pacific Bell Dec. 6 *Ex **Parte*** Letter).

256 ***See*** Pacific Bell Oct. 17 *Ex **Parte*** Letter. Attach. 2 at 2.

257 Pacific Bell Huston/Lawson **Aff.** at para. 111

258 ***See SWBT Texus Order,*** 15 FCC Rcd at 18427, para. 209. Pacific Bell's pre-ordering systems allow carriers to perform functions required by our section 271 orders and some additional functions. The functions Pacific Bell's pre-ordering systems provide include the ability to: (1) retrieve customer service information (CSIs) and customer service records (CSRs); (2) validate addresses; (3) select, reserve, and cancel telephone numbers; **(4)** obtain information on pooled telephone numbers; (5) determine services and features available to a customer; ***(6)*** obtain due date availability; (7) access loop qualification information; (8) view a customer's directory listing; **(9)** determine dispatch availability; (10) retrieve local primary intraLATA carrier (LPIC) and primary interexchange carrier (PIC) lists: (11) access the Common Language Location Identifier (CLLI) code; (12) verify connecting facility assignments; (13) validate network channels and network channel interfaces; (14) determine order status and provisioning order status; and (15) perform a remote access to call forwarding inquiry. Pacific Bell Huston/Lawson Aff. ar para. 112.

259 ***See*** Pacific Bell Johnson Aff. at paras. 59-66; *see also* Appendix B.

fields.[260] As the Commission has held previously, providing pre-ordering information in a parsed format is a strong indicator that it is possible for competitive LECs to integrate.[261] In addition, Pacific Bell explains that the four pre-ordering interfaces offer complete synchronization of every OBF-defined pre-ordering field, and certain additional nondefined pre-ordering fields, with the associated ordering fields.[262] We also rely on the third-party test performed by Nightfire Software, Inc., which determined that all pre-order responses were parsed as per the Local Service Preordering Requirements (LSPOR).[263] Nightfire concluded that Pacific Bell's EDI system accurately and effectively allows competitive LECs the capability to integrate preorder responses with order requests to Pacific Bell.[264] Moreover, no competitive LEC challenged these findings nor submitted any comments expressing any concerns with regard to pre-order to order integration.

83. We reject AT&T's claim that Pacific Bell has failed to provide competitive LECs with equivalent access to correct directory listing information at the pre-ordering stage.[265] Specifically, AT&T claims that Pacific Bell does not provide Competitive LECs with proper directory listing information when a customer has chosen an alternative community name for their listing.[266] In its initial comments, AT&T stated that its inability to discern a customer's correct listing (whether by postal community or alternative community) has led to address mismatches which caused nearly six percent of UNE-P orders that AT&T submitted in August to be rejected.[267] Pacific Bell notes, however, that AT&T need not submit directory listing information if the end user simply wants to maintain its current listing—and, thus, AT&T could have avoided the majority of these rejects simply by keeping the directory listing (DL) field blank.[268] Pacific Bell also states that not all of the rejects cited by AT&T are attributable to the

---

260 Pacific Bell Huston/Lawson Aff. at para. 131

261 *BellSouth Georgia/Louisiana* **Order,** 17 FCC Rcd at *9078,* para. 120.

262 This means that OBF-defined pre-ordering fields and certain additional fields can be stored and automatically populated on associated ordering fields on the LSR without requiring a CLEC to adjust and/or reconfigure characters. Pacific Bell Huston/Lawson Aff. ar para. 133.

263 Nightfire Software, Report of Pacific Bell/Nevada Bell Preorder-to-Order Integration Testing Report (June 25, 2002) (Nightfire Repon), App. A, Tab 18.

264 Nightfire Report at 3.

265 AT&T Comments at 38-39.

266 Alternative community names are community names that customers can request for inclusion in their directory listing in lieu of the community listing in their postal or service address. For example, a customer in Daly City (which is located outside of San Francisco) might request that the directory list San Francisco as his or her community. AT&T Comments at 38.

267 AT&T Comments at 38.

2611 Pacific Bell Reply Affidavit of Stephen D. Huston and Beth Lawson, Tab 9 (Pacific Bell HustodLawson Reply Aff.) at para. 27.

alternative community name issue, and suggests that some rejects were attributable to a different software problem, or to AT&T's own errors.[269] As we have stated in other section 271 orders, the Commission has not engaged in a parity or direct benchmark analysis of a carrier's reject rate, in part because a high reject rate for one carrier does not necessarily indicate flaws in the BOC's OSS systems or processes, but instead could be attributable to the competitive LEC's own actions.[270] Moreover, in this instance, we find the reject rate of approximately six percent experienced by AT&T is relatively low and does not suggest that AT&T has been deprived of a meaningful opportunity to compete. We also note that Pacific Bell provides competing carriers with timely reject notices, which allows carriers to resolve ordering problems in a relatively efficient manner."' In any event, Pacific Bell has responded to AT&T's concerns by implementing system modifications designed to eliminate two types of rejects experienced by AT&T.[272] We are, therefore, satisfied that Pacific Bell has corrected the problem AT&T was experiencing. Pursuant to section 271(d)(6), we will monitor Pacific Bell's performance in this area for compliance with the conditions of approval in this order."' AT&T and others should bring to the attention of the Commission's Enforcement Bureau any areas of deteriorating performance.

c. Ordering and Provisioning

84. We find, as did the California Commission,"' that Pacific Bell satisfies checklist item 2 with regard to ordering and provisioning in California. The record demonstrates that Pacific Bell provides nondiscriminatory access to its ordering and provisioning systems and processes and consistently satisfies the performance standards on the relevant performance

---

269 Pacific Bell Huston/Lawson Reply Aff. at paras. 26, 28.

270 *See SWBT Texas Order,* 15 FCC Rcd at 18442, para. 176. In that instance, the Commission noted that the order rejections varied widely by individual carrier, from 10.8 percent to higher than 60 percent, hut concluded that these overall reject rates did not appear to indicate a systemic flaw in the BOC's OSS.

271 Pacific Bell Johnson Aff. at paras. 74-75; *see also* Appendix B, PM 3 (Average Reject Notice Interval)

272 Pacific Bell explains that prior to October 9, 2002, Pacific Bell's Listings Gateway did not recognize valid abbreviations for either postal or alternative community addresses. This was corrected with a programming change on October 9, 2002. Pacific Bell Huston/Lawson Reply Aff. at para. 28. Pacific Bell also explains that, on an Address Validation Inquiry, Pacific Bell's pre-order interfaces would return the alternative community name for the end user, when available, rather than the postal community name. This would cause AT&T's order to he rejected because Pacific Bell's systems require the end- user's actual location (i.e. the postal community name) to be included on the ordering form. Pacific Bell modified its systems on October 15, 2002, *so* that an Address Validation Inquiry would return the postal community name to the competitive LEC, thereby addressing this second problem leading to address mismatches. Upon further review of AT&T problems, Pacific Bell realized that it had **not** applied the modification to the 3.06 version of EDI and CORBA, which AT&T uses. Pacific Bell states that it implemented this fix on November 2,2002. Pacific Bell *Huston/Lawson* **Reply Aff. at paras. 29-30.**

271 ***See*** *FCC's* ***Enforcement Bureau*** *Establishes* ***Section*** *271* ***Compliance Review Program***, Public Notice, DA 02-1323 (rel. June 6, 2002).

274 *See* California Commission Order at **2,** 270, 277. *305*, **307,** 308

measurements, with few exceptions.[275] We reject AT&T's argument that these few discrepancies warrant a finding of checklist noncompliance.[276] First, AT&T argues that Pacific Bell failed to provide competitors with timely notices that it would miss a scheduled installation date, and the performance data shows that Pacific Bell has fallen short of the benchmark standard for this measure for each of the past five months for UNE-P.[277] We note, however, that late missed commitment notices occur infrequently.[278] In fact, Pacific Bell misses committed due dates on a very small percentage of competitors' total UNE-P orders completed, demonstrating generally timely performance.'" We view Pacific Bell's performance issuing timely missed commitment notices within the broader context of Pacific Bell's high rate of on-time performance provisioning UNE-P orders and, therefore, do not find the identified disparity to be competitively significant.

85. AT&T also points to Pacific Bell's failure in two recent months to meet the standard for returning timely Firm Order Confirmations (FOCs) for electronically received, manually-handled UNE dark fiber and Resale PBX orders.[280] We note, however, that the volumes for these orders were very low and, therefore, may produce a distorted picture of Pacific Bell's performance.'" Indeed, Pacific Bell satisfied the standard for three of the past five

---

275 *See* Appendix B; Pacific Bell Johnson Aff. at paras. 67-84.

276 ***See*** AT&T Reply at 23,

277 AT&T Reply at 23; AT&T Toomey/Walker/Kalb Decl. at paras. 58-59. *See* Appendix B, PM 6-652000 (Average Jeopardy Notice Interval – Missed Commitment – UNE-P Basic Port and (8 db and 5.5 db) Loop field work/no field work). Jeopardy notices alert customers when Pacific Bell misses a committed due date, and Pacific Bell should provide 95 percent **of** missed commitment notices to competitors within 24 hours. ***See*** Pacific Bell Application, App. C. Tab 7 **I** (Joint Partial Settlement Agreement) at 96-98.

278 Pacific Bell sent 7 missed commitment notices in May 2002, 10 in June, 10 in July, 61 in August, and 127 in September. ***See*** Appendix B, PM 6-652000 (Average Jeopardy Notice Interval – Missed Commitment – UNE-P Basic Pon and (8 db and 5.5 db) Loop field workino field work); Pacific Bell Johnson Aff. at para. 152 n.89.

279 Total UNE-P orders completed for this period were 53,161 in May 2002, 56,143 in June, 79,476 in July, 93,033 in August, and 124,691 in September. Appendix B, PM 11 (Percent of Due Dates Missed, UNE-P - Basic Port and (8 db and 5.5 db) Loop field work/no field work). Based on this data, therefore, Pacific Bell missed less than **I** percent of committed due dates during the period May through September 2002.

280 AT&T Toomey/Walker/Kalb Decl. at paras. 6 1-62. A FOC provides a committed due date for a requested service, and PM 2 measures the average time it takes Pacific Bell to issue a FOC after receiving **a** valid service request. ***See*** Joint Partial Settlement Agreement at 86-89. Pacific Bell failed the 6-hour benchmark for providing timely FOCs for Resale PBX orders in May and June 2002, providing FOCs to competitors in 13.25 hours in May and 23.65 hours in June. Pacific Bell failed the 6-hour benchmark for UNE **dark** fiber orders in June and July 2002, providing FOCs to competitors in 37.29 hours in June and 8.91 hours in **July.** Appendix B, PMs 2-203100 (Average Notice Interval – Electronic/Manual – Resale PBX) and 2-204003 (Average Notice Interval – Electronic/Manual – UNE dark fiber).

281 For Resale PBX, Pacific Bell received 7 competitive LEC orders in May and 14 orders in June. For UNE dark fiber, Pacific Bell received 5 orders in June and 5 orders in July. Appendix B, PMs 2-203100 (Average Notice (continued.. ..)

months, and we note that Pacific Bell's performance data reflect success in returning on-time FOC notices for all other service categories. Finally, AT&T argues that Pacific Bell failed to provide competitors with certain types of completion notices on time. The performance data show that, for three months, Pacific Bell failed the benchmark – 95 percent within 24 hours –for timely returning completion notices for electronic orders that should not "fall out" for manual processing, but did.[282] We note that Pacific Bell has shown general steady improvement on this measure, meeting the benchmark in July and August and barely missing it in September.[283] We also note that very few electronic orders that should be electronically processed fell out for manual processing.[284] Considering Pacific Bell's improving performance, we do not find that these isolated ordering and provisioning discrepancies warrant a finding of checklist noncompliance. We will monitor Pacific Bell's performance in this area for compliance with the conditions of approval in this order.[285]

d. Maintenance & Repair

86. Wc conclude that Pacific Bell provides nondiscriminatory access to maintenance and repair OSS functions. We find that Pacific Bell has deployed the necessary interfaces, systems, and personnel to enable requesting carriers to access the same maintenance and repair functions that Pacific Bell provides to itself."' The third-party test conclusions **support** our finding on functionality and no commenter challenged those results.[287]

(Continued from previous page)
Interval – Electronic/Manual - Resale PBX) and 2-204003 (Average Notice Interval – Electronic/Manual – UNE dark fiber).

[282] AT&T Toomey/Walker/Kalb Decl. at para. *63;* Appendix B, PM 18-180040l (Average Completion Notice Interval – Fully Electronic Fallout– LEX/EDI LASR). ***See*** Joint Partial Settlement Agreement at 134-35.

[283] Pacific Bell provided 87.64 percent of completion notices to competitors within 24 hours in May, 92.76 percent in June, and 94.93 percent in September. Appendix B, PM 18-1800401 (Average Completion Notice Interval – Fully Electronic Fallout – LEX/EDI **LASR).**

[284] ***See*** Appendix B, **PM** 18-1800502 (Average Completion Notice Interval – Fallout Level – LEX/EDI LASR), Based on this data. an average of less than .5 percent of electronic orders that should not fall out for manual processing, did fall out for the period May through September 2002. *Id.*

[285] ***See FCC's Enforcemenr Bureau Establishes Section 271 Compliance Review Program,*** Public Notice, DA 02-1322 (rel. June 6, 2002).

[286] ***See BellSouth Georgia/Louisiana Order,*** 17 FCC Rcd at 9111 para. 169; ***Bell Atlantic New York Order,*** **15** FCC Rcd at 4067, para. 211. Pacific Bell provides competing carriers with several options for requesting *maintenance* **and** reporting troubles. Competing carriers may use the GUI Electronic Bonding Trouble Administration (GUI-EBTA) available from the SBC Web Toolbar, the Electronic Bonding Trouble Administration application to application interface (EBTA), and the Toolbar Trouble Administration application (TTA). Pacific Bell Huston/Lawson Aff. at paras. 210-15.

[287] TAM Final Report at 99-104.

87. We also find that Pacific Bell allows competing carriers to access its maintenance and repair functions in substantially the same time and manner as Pacific Bell's retail operations, and restores service to competing carriers' customers in substantially the same time and manner and with a similar level of quality as it restores service to its own customers.[288] We make these findings upon close examination of the performance data and after considering the concerns expressed by the Department of Justice and AT&T's comments that Pacific Bell failed to meet parity at times for certain performance measurements.[289] We find that Pacific Bell satisfied the applicable parity or benchmark standard for each major performance measurement with few exceptions.[290] While Pacific Bell did occasionally miss the standards in individual months for certain types of services, we find these misses to be narrow and do not reflect discriminatory performance overall."[291] We therefore reject AT&T's claims that Pacific Bell's scattered failures demonstrate discriminatory performance."[292] We will monitor Pacific Bell's performance in this area for compliance with the conditions of approval in this order.

e. Billing

88. The Commission has established in past section 271 orders that, as part of its OSS showing, a BOC must demonstrate that competing carriers have nondiscriminatory access to its billing systems.[293] In particular, BOCs must provide two essential billing functions: (1)

---

288 *See BellSouth Georgia/Louisiana Order,* 17 FCC Rcd at 9111 para. 169; *Ball Atlantic New York Order,* 15 FCC Rcd at 4067. para. 211

289 Department of Justice Evaluation at 3 n.10: AT&T Comments at 48-49; AT&T Reply at 30, 33-34.

290 *See* Pacific Bell Johnson Aff. at paras 154-55, 191-96; *see also* Appendix B, PM 19 (Customer Trouble Report Rate. PM 20 (Percentage of Customer Trouble Not Resolved Within Estimated Time), PM 21 (Average Time to Restore), PM 23 (Frequency of Repeat Troubles in 30-Day Period).

291 The Department of Justice and AT&T point to Pacific Bell's failure to meet parity for UNE-P services for several of the measurements. Nevertheless, we determine that these misses are not competitively significant. For example, for PM 19 (Customer Trouble Report Rate), Pacific Bell failed the parity measure for UNE-P services in June, July, August and September 2002. *See* PM 19-1993600. For the five-month data period, however, the average trouble report rate for competitive LEC UNE-P customers was 0.61. while for Pacific Bell retail customers, the average was 0.47. This very slight difference does not appear to be competitively significant. Similarly for PM 20 (Average Time to Restore), Pacific Bell reports average time to repair for competitive LEC UNE-P services that are only slightly longer than for retail. *See* PM 21-2197401. Although Pacific missed parity for average time to repair UNE-P for July, August and September 2002, on average for the five-month period, Pacific Bell restored competitive LEC UNE-P in 8.52 hours, while it restored its retail customers in 7.64 hours. This *is* a difference of less than one hour. Finally for PM 23 (Frequency of Repeat Troubles in 30-Day Period), Pacific Bell failed to meet the parity standard for UNE-P Services in August and September 2002. See PM 23-2393600. However, the discrepancy between the rate of repeat troubles for competitive LECs and Pacific Bell retail was not significant. Competitive LEC UNE-P customers had an average repeat trouble report rate of 8.81 percent for the fivemonth data period, while Pacific Bell retail cuslomers had an average repeat trouble report rate of 7.77 percent. This is only a difference of slightly more than one percent.

292 *See* AT&T Reply at 24-25

293 *Verizon New Jersey Order,* 17 FCC Rcd at 12333, para. 121